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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE MISKOVSKY,
Petitioner,

v.

THE OKLAHOMA PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Constitution supplant state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth?

2. Assuming the editorial cartoon was defamatory and a statement of fact, was there sufficient evidence of actual malice under the standard of *New York Times* v. *Sullivan* for the editorial cartoon to be submitted to the jury?

3. Assuming expressions of pure opinion are constitutionally protected under *Gertz* v. *Welch*, was there sufficient evidence of undisclosed defamatory facts in the three articles and in the editorial for the issue of defamation to be submitted to the jury?

4. Does the United States Constitution require a balancing between the rights of the media defendant and the rights of candidates for public office to freedom of speech and protection of reputation?

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Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, Am. Bar Foundation Research J. 493 (Summer 1980)	29
R.D. Sack, *Libel, Slander, and Related Problems* 83 (1980)	23
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THE OKLAHOMA PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner George Miskovsky respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Oklahoma, entered on January 12, 1982, reversing the libel judgment on a jury verdict for petitioner in the sum of one million dollars, and remanding the case with instructions to dismiss.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court, which appears in the Appendix at 1a, has been officially reported at Vol. 53 Oklahoma Bar Journal 76. The order of the Oklahoma Supreme Court denying petitioner's motion for rehearing appears at Appendix 19a.

JURISDICTION

The opinion of the Oklahoma Supreme Court in this case was issued on January 12, 1982. The order denying petitioner's motion for rehearing was issued on April 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

   Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. United States Constitution, Amendment XIV § 1:

   [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

Petitioner George Miskovsky [hereinafter "petitioner" or "Miskovsky"], a candidate in 1978 for the United States Senate, instituted this action for libel in the District Court of Cleveland County, Norman, Oklahoma. The libel arises out of three newspaper stories dated August 11, 1978, an editorial dated August 11, 1978, and a cartoon dated August 14, 1978, all appearing in newspapers published by respondent Oklahoma Publishing Company [hereinafter "OPUBCO"]. In its answer, OPUBCO pleaded the affirmative defenses of privilege, truth and fair comment.

In an effort to prevent a trial by jury, OPUBCO sought stay orders in both the Oklahoma Supreme Court and the United States District Court for the Western District of Oklahoma. These applications were denied and the case was tried before a jury in the District Court of Cleveland County, Oklahoma, on May 19-21, 1980. At the conclusion of petitioner's case, the trial court denied OPUBCO's motion for a directed verdict, thus ruling that petitioner had submitted sufficient evidence of actual malice under the First Amendment for the factual issues to be resolved by the jury. (Vol. III, 161)[1] OPUBCO chose to present no evidence whatsoever.

After approximately six hours of deliberation, the jury awarded damages to petitioner in a total amount of one

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[1] References are to the volume and page number of the Official Court Reporter's Transcript. The transcript of each day's proceedings is numbered separately.

million dollars, $35,000 actual damages and $965,000 exemplary damages. (Vol. III, 237-238) Immediately thereafter, the trial judge denied both OPUBCO's oral motion for judgment notwithstanding the verdict and motion for mistrial. (Vol. III, 239-240)

B. IDENTIFICATION OF PARTIES

1. Petitioner George Miskovsky, son of immigrant parents, was born and raised in Oklahoma. He graduated from the University of Oklahoma Law School with high honors, including induction into Order of the Coif. Upon graduation from law school, Miskovsky was admitted to the Oklahoma Bar. He has practiced law in Oklahoma City for more than forty years. During his career, Miskovsky has served as Public Defender, County Attorney, State Representative, and State Senator. In 1958, he was a candidate for Governor. Twenty years later, at the age of sixty-eight, Miskovsky became a candidate for the office of United States Senator. (Vol. I, 4-12)

2. Respondent OPUBCO, a multi-media conglomerate, is a privately held corporation controlled by the Gaylord family since Oklahoma statehood. OPUBCO publishes three newspapers in Oklahoma and one in Colorado Springs, Colorado. In addition, OPUBCO owns seven television stations, three radio stations, including Gaylord Broadcasting Company, and numerous other diversified holdings. (Vol. III, 2-4) The OPUBCO newspapers involved in this case are *The Daily Oklahoman* and *The Oklahoma City Times*. These papers have a combined circulation of approximately 295,000 daily copies and 300,000 Sunday copies and are distributed throughout the state of Oklahoma. (Vol. III, 3-5)

C. FACTUAL BASIS OF THE LIBEL CLAIM

1. The Press Conference

On August 9, 1978, during the course of the United States Senate primary race, petitioner attended a candidate's forum in El Reno, Oklahoma, sponsored by the Women's Democratic Club of Canadian County. The

forum was open to all candidates, including Governor David Boren, State Senator Gene Stipe, former Congressman Ed Edmondson, Dean Bridges, Rosella Saker and Anthony Points. Besides Miskovsky, only candidates Bridges and Points chose to attend. The opinion of the Oklahoma Supreme Court describes the forum:

> While addressing the group, candidate Points read from a political flyer, copies of which he had distributed to the audience. In part the flyer stated:
>
> > 'I am against homosexuals or bisexuals in office or government. They are threats to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.
> >
> > There is a side of David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.
> >
> > I don't think that is what you want for a U.S. Senator.'
>
> In addition to reading these remarks, candidate Points categorically stated that 'Governor David Boren is a homosexual.' (App. 2a)

Miskovsky and others in attendance were amazed at the unequivocal statement which Points had made. Although Miskovsky had been aware of "widespread discussions and beliefs and rumors throughout the state for—to my knowledge about two years—" (Vol. I, 19), he had no belief one way or the other about the rumors or Points' statement. (Vol. I, 79)

After hearing the allegations, Miskovsky "waited to see if there was anything done about it . . . considered it," and debated with himself whether he should call it to the "people's attention" because "the people had a right to have that question asked." (Vol. I, 20) The following day, August 10, Miskovsky delivered a letter to Governor Boren's office. The letter quoted in full the

charges made by Points and requested the Governor to answer under oath the following questions:

> Do you know what a homosexual or bisexual is?
>
> Are you a homosexual or bisexual?
>
> Have you ever been a homosexual or bisexual?
>
> Have you ever engaged in homosexual or bisexual activity? (App. 4a)

The letter makes clear that Miskovsky himself was making no allegations about Governor Boren. (App. 3a-5a) Aware that the letter was newsworthy, Miskovsky called a press conference that same day at which he made copies of the letter available to members of the news media. (App. 5a)

2. OPUBCO's Reaction

OPUBCO reporters covered the press conference and received copies of the letter.[2] OPUBCO Managing Editor Jim Standard, head of the State Capitol Bureau Ed Montgomery, and many other OPUBCO reporters had been aware of these rumors about Governor Boren for at least two to three years. (Vol. II, 85, Vol. III, 91-92) Managing Editor Standard had even discussed the matter with Boren as early as 1976. (Vol. II, 83)[3]

The next day, August 11, OPUBCO published three news articles and an editorial dealing with Points' charges, Miskovsky's press conference, and the Governor's response to these events. The first article appeared in *The Daily Oklahoman* with the headline, "Sex Charge a Lie, Governor Boren Replies." Within the article, OPUBCO planted the seed that a conspiracy existed between Miskovsky and Points:

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[2] As discussed *infra*, OPUBCO vigorously endorsed Governor Boren's campaign.

[3] Governor Boren's staff members also were aware of the rumors. They did not know how to deal with them and were relieved that the matter had finally become public. (Pl's Ex. 9)

> Asked if he thought Miskovsky and Points worked together to discredit him, Boren replied, 'I will just have to leave that to your speculation.' (App. 21a)

Inserted within that article is the caption, "Miskovsky and Mud—an editorial—page 10."

Immediately below this article appeared a second article headlined, "Miskovsky, Points Lashed-Allegations Stir Storm":

> Allegations against Governor Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation.
>
> • • • •
>
> Rob Pyron, Boren's campaign secretary, said campaign headquarters was swamped with calls Thursday afternoon from persons voicing support for the Governor and anger over the allegations of Points and Miskovsky.
>
> • • • •
>
> The [Tulsa] World said Miskovsky won a place in state history saying he 'took the prize for the filthiest stunt that has ever been pulled by a serious candidate for major public office in this state.'
>
> Oklahoma City radio station KTOK said the names of Miskovsky and Points should be stricken from the ballot.
>
> Such loathsome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points would lend to the U.S. Senate if they were elected. [KTOK radio said.]
>
> The Shawnee News-Star editorialized in Friday editions that 'Cesspool allegations have no place in the political arena. We believe that George Miskovsky has no place in it any longer either.' (App. 23a-25a)

The third article appeared in *The Oklahoma City Times* and was captioned, "Boren's Friends Express Disgust." It stated in part:

> Longtime friends and close associates of Gov. David Boren expressed shock and disgust in his hometown

> today after allegations surfaced Thursday that he is a homosexual.
>
> • • • •
>
> I'm really shocked. I just can't believe it, [Boren's former pastor] said of the allegations.
>
> • • • •
>
> Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron, said he expected Miskovsky to be the "hatchet man" in the campaign. (App. 26a)

The editorial of the *The Daily Oklahoman*, which accompanied the first and second articles, was entitled, "Miskovsky and Mud." It contained false and defamatory statements:

> George Miskovsky has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing.
>
> In a press conference reported on elsewhere in The Oklahoman, the septuagenarian lawyer has attempted to inject some sign of vitality in his moribund campaign for the Democratic nomination for the U.S. Senate.
>
> His tactic was to indirectly suggest, in the form of a letter asking questions, that Gov. David Boren has homosexual tendencies.
>
> Were it not for the fact that American law and tradition make it virtually impossible to libel or slander a political figure, Miskovsky's words would be actionable. As it is, they are merely despicable and stupid. (App. 27a)

The editorial went on to state that Boren's Senate candidacy should be weighed on the record and on the positions taken on national issues and "not on the scurrilous defamation hurled by Miskovsky. . . . Miskovsky should save his gutter theatrics for the next time he is defending some scoundrel in criminal court." (App. 28a)

Also published in *The Daily Oklahoman* on August 11 was the caption, "First Lady Molly Boren kisses Gov.

David Boren upon his arrival in Oklahoma City for a press conference to refute fellow U.S. Senate candidate George Miskovsky's allegations." (Pl's Ex. 23)

On August 14, *The Oklahoma City Times* published an editorial cartoon captioned, "Isn't That Right, Anthony?" This was an effigy falsely depicting Miskovsky as a puppeteer who was holding and manipulating a puppet, Points. (App. 29a)

D. THE LIBEL TRIAL

As recognized by the Oklahoma Supreme Court, the evidence at trial conclusively established that Governor Boren was the favored candidate of OPUBCO. (App. 17a; Vol. II, 21, Vol. III, 11, 93) OPUBCO's endorsement of Boren was shown, for example, in an editorial cartoon entitled, "Boren vs. Borin," which appeared on August 16, 1978. The cartoon depicted all the major candidates except Boren. Senator Gene Stipe is depicted with the words, "I am not a Crook!"; former Congressman Ed Edmondson is depicted with the words, "I am not a Has-Been!"; former Senator Miskovsky is depicted with the words, "I am not GAY!"; and John Q. Public is depicted with the words, "I am not a Bit Interested!" (App. 30a)

OPUBCO's favoritism of Governor Boren was also shown by its failure to make Points' statement public although it had a copy of the statement *prior* to Miskovsky's press conference. Because Miskovsky chose to let the voters know about Points' statement, OPUBCO decided to engage in a course of conduct designed to damage Miskovsky's reputation and to harm his campaign. On the afternoon of August 10, following the press conference, Managing Editor Jim Standard in a discussion with Publisher Edward L. Gaylord notified Gaylord that "tomorrow we are really going to *blister* [Miskovsky]." (Vol. II, 147) (Emphasis added.) The references to Miskovsky's profession and the statement that he should "save his gutter theatrics for the next time he is defend-

ing some scoundrel in criminal court" were intended by Standard to be a "good example . . . so the readers would understand what was going on." (Vol. II, 147)

Against this backdrop, OPUBCO published the damaging articles, editorial and cartoon even though OPUBCO actually knew that Miskovsky had made no allegation about Governor Boren. Moreover, prior to publication, OPUBCO failed to conduct any investigation concerning the asserted connection between Points and Miskovsky.[4] Managing Editor Standard admitted that at no time did he believe there was any such connection. (Vol. II, 105) Simply put, OPUBCO knew better than to imply that a conspiracy existed between Points and Miskovsky to harm Governor Boren. (Vol. II, 124-125)

In regard to the "puppet" cartoon, editorial cartoonist Chan Lowe testified that in drawing the cartoon he relied upon the information appearing in the OPUBCO news articles. (Vol. III, 114) The conspiratorial point of the cartoon was shown by the admission at trial of Assistant Managing Editor Robert E. Lee who testified:

> Q. Does that—do you feel that that gives the impression to the public that George put him up to that?
>
> A. I would hope so. I think that is what Chan was trying to do, and if they didn't give the public the impression, then he wasn't doing a very good job, was he? (Vol. II, 34)

---

[4] Only after the publication of the articles in question did OPUBCO's chief investigative reporter Jack Taylor conduct any investigation regarding a possible link between Points and Miskovsky. The investigation revealed no connection whatsoever between Points and Miskovsky, but did indicate that Points was not what he represented himself to be. Although the investigation developed no relationship between Miskovsky and Points, OPUBCO in its news articles never publicized this fact and continued to link Miskovsky and Points. On August 30, 1978, OPUBCO published two separate full-page articles headlined, "Thwarted Miskovsky Denies 'Gay' Charge Link" and "Who is Anthony Points?" (Pl's Ex. 18; Vol. II, 184-185)

At the conclusion of the trial, the court properly submitted the three articles, editorial and cartoon to the jury for determination of whether they singly or in combination libeled Miskovsky. The court carefully instructed the jury concerning the applicable law. The test of actual malice as articulated by this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), was given to the jury almost verbatim:

> In order to prove that he has been libeled by the defendant, plaintiff must prove the publications were knowingly false or were published with reckless disregard of whether they were true or not. (Instruction 14, App. 38a)

The Court further explained the *New York Times* requirement:

> Proof of malice requires evidence showing that the defendant published the material complained of with an awareness of the probable falsity of the publications or that there be sufficient evidence to permit the conclusion that the defendant, through its agents, published the alleged defamatory writings and cartoons with reckless disregard of the truth of the publications in order for the plaintiff to be entitled to recover damages from the defendant. (Instruction 14, App. 38a)

In addition, the trial court correctly stated the "clear and convincing" proof requirement and admonished the jury that this was a "much higher" burden than preponderance of the evidence. (Instruction 5, App. 35a) At OPUBCO's request, the court gave the following additional instruction:

> Everyone has the right to comment and express their opinion, especially on matters of public importance. Misstatements of fact in expressions of opinion are protected unless they are made with malice as defined in these instructions for the purpose of damaging another's reputation. Expressions or statements of opinion cannot be held to be libelous. This is true even though those expressions of opinion may be harsh, vituperative, and embarrassing to the Plaintiff. (Instruction 13, App. 37a-38a)

Thus a properly instructed jury, after hearing the evidence and after careful deliberation, concluded that OPUBCO had in fact libeled George Miskovsky.

E. FEDERAL QUESTIONS PROPERLY RAISED

The federal questions raised in this Petition were properly raised before the Oklahoma Supreme Court. As discussed above, petitioner timely submitted to the trial court proposed jury instructions that properly reflected the requirements of the United States Constitution on the issues of falsity, defamatory meaning, opinion and actual malice. (App. 35a, 38a) The instructions actually given by the trial court, though not precisely those sought by petitioner, submitted these issues substantially correctly.[5]

The parties agreed that the United States Constitution required the Oklahoma Supreme Court to conduct its own independent review of the evidence to make certain that controlling constitutional principles had been properly applied. Appellant's Brief at 20-22; Appellee's Brief at 26-29. Petitioner contended, however, that the scope of this review was limited to that required by the constitutional principles of *New York Times* and denied that the Constitution required "the kind of wide-ranging appellate review sought by OPUBCO in this case." Appellee's Brief at 26-28. Petitioner argued that "[o]nce the *New York Times* standard is satisfied, the states are free to impose liability in accordance with their own common law or statutory precepts." Appellee's Brief at 24. The question of the extent to which these issues are controlled by federal constitutional law thus was squarely presented to the Oklahoma Supreme Court.

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[5] The only exception concerns Instructions 5 and 20, which assigned to plaintiff the burden of proving falsity. (App. 34a-35a, 41a) Petitioner's contention is that with respect to this issue, the instructions were more favorable to OPUBCO than the Constitution requires.

REASONS FOR GRANTING PETITION

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION OF THE OKLAHOMA SUPREME COURT RAISES AN IMPORTANT FEDERAL QUESTION NOT DECIDED BY THIS COURT CONCERNING THE EXTENT OF FEDERAL CONSTITUTIONALIZATION OF STATE DEFAMATION LAW.

When this Court ruled in *New York Times* that the First Amendment requires a public figure to demonstrate actual malice in order to prevail in a libel case, the Court did not intend to abolish the common law of libel. The Oklahoma Supreme Court, however, erroneously concluded that under *New York Times* and its progeny the Oklahoma law of libel had been supplanted by federal constitutional law.

The jury by its verdict implicitly found that the respondent had defamed petitioner, that respondent's statements were false, that respondent's publications were not protected statements of opinion, and that respondent published with actual malice. The Oklahoma Supreme Court reversed the judgment entered pursuant to this verdict, not because of any error in the instructions under which the case was submitted, but on the ground that petitioner's evidence on the issues of defamation, falsehood and malice was constitutionally deficient. (App. 9a)

It is apparent from the opinion of the Oklahoma Supreme Court that the court incorrectly believed that state law on all of these issues had been both superseded and controlled by the requirements of the Constitution.[6] Except

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[6] The Oklahoma Supreme Court would not have overturned the jury verdict on state law grounds because of the limited appellate review of jury verdicts under Oklahoma law. In *Wat Henry Pontiac v. Pitcock*, 301 P.2d 203, 207 (Okla. 1956), the Oklahoma Supreme Court held:

> In a law action the verdict of the jury is conclusive as to all disputed facts and all conflicting statements, and where there is any competent evidence reasonably tending to support the verdict of the jury, this court will not invade the province of

for one case cited to show the applicability of *New York Times* to candidates for public office (App. 18a, n.1), the court did not cite a single Oklahoma case. Nor did the court cite the Oklahoma statute which establishes the standards governing libel actions. (App. 31a) The court did not refer to state standards of judicial review, but instead discussed extensively the requirements of *New York Times*. After this preface, the court then examined the evidence with respect to each of the five publications alleged to be libelous.[7] The court drew no distinctions regarding the source of law or the standard of review applicable to the issues of defamation, falsehood and malice. To the contrary, the court obviously assumed that federal law controlled and that under federal law the court was required to engage in the same type of *de novo* review with respect to each issue before the court.

It is now well settled that the finding of actual malice is a "constitutional fact" subject to *de novo* review by this Court. *See Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion); *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971). Petitioner acknowledges that it is appropriate for a state appellate court to engage in a similar review of evidence on the issue of actual malice. *Cf. Pickering* v. *Board of Education*, 391 U.S. 563, 578,

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the jury and will not disturb its verdict and judgment based thereon. *Wiggins* v. *Sterne*, 293 P.2d 603, 604 (Okla. 1955).

The Oklahoma Supreme Court has held that this very narrow standard of review applies to defamation actions under state law and that in such an action "[w]e do not weigh the evidence or the correctness of the finding of the facts by the jury." *Akins* v. *Altus Newspapers, Inc.*, 609 P.2d 1263, 1266 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980). Just as this Court has concluded that defamation suits are not exempt from the normal rules of discovery, *Herbert* v. *Lando*, 441 U.S. 153 (1979), so also should the traditional Oklahoma policies governing appellate review of jury verdicts be applied.

[7] Petitioner concedes that he is a public figure plaintiff to whom the actual malice requirement of *New York Times* applies.

n.2 (appendix to opinion of the Court) (1968). This Court has never held, however, that the entire tort of libel has been constitutionalized. On the contrary, the Court has sought to minimize the intrusion of federal constitutional law, preserving the authority of the states to apply their own principles of defamation law insofar as those principles are not inconsistent with the demands of the First Amendment. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Petitioner's case presents the issue of whether the states are free to apply their own statutory or common law rules to *issues other than the actual malice question* in public figure libel cases.[8] Specifically, the questions are (a) whether the issues of defamatory meaning, opinion[9] and falsity are controlled by federal constitutional law, and (b) whether jury findings on these issues must be subjected to *de novo* appellate review.

The Oklahoma Supreme Court incorrectly held that in order to prevail under *New York Times* petitioner must show:

(1) The publication of a defamatory statement;

(2) That the defamatory statement was false;[10] and

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[8] This Court recently expressed interest in the interplay between the First Amendment and state tort law by granting a writ of certiorari in *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 102 S.Ct. 500 (1981), *cert. dismissed per stipulation*, 102 S.Ct. 984 (1981). One of the issues raised in Wilson's petition was similar to the question raised by petitioner, *viz.*, whether a plaintiff in a libel action brought against a publisher must shoulder the burden of proof on the issue of truth or falsity of the allegedly defamatory statements.

[9] See discussion of opinion, *infra*, III.

[10] Under Oklahoma law truth is an affirmative defense to a libel action and must be proven by the defendant. *See Hetherington* v. *Griffin Television, Inc.*, 430 F.Supp. 493 (W.D. Okla. 1977). Because OPUBCO failed to prove that the publications were true or even to present any defense whatsoever to the jury—not a single witness or exhibit—petitioner would have prevailed on this issue if the Oklahoma Supreme Court had relied on state law.

> (3) That the defamatory falsehood was made with actual malice—made with knowledge that it was false or with reckless disregard of whether it was false or not. (App. 7a)

Later in its opinion, the Oklahoma Supreme Court repeated that holding, leaving no doubt that the Court assigned the burden to petitioner of proving by "clear and convincing" evidence the falsity of the publications:

> After reviewing the evidence, we conclude that with respect to each publication, Mr. Miskovsky has failed to present evidence of defamation, falsehood, and malice, sufficient to present the issue to a jury. (App. 9a)

Contrary to the assumption of the Oklahoma State Supreme Court, this Court in *New York Times* did not shift the burden to plaintiff to demonstrate the falsity of a defamatory communication.[11] Eaton, *The American Law of Defamation through Gertz* v. *Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1381-1382 (1975). Rather, this Court's holding in *New York Times* merely shifts the focus of inquiry from the content of the speech to the conduct of the defendant. Specifically, the Court found that the traditional defense of truth allowed under state law was insufficient, in and of itself, to provide the "breathing space" necessary to

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[11] Subsequent decisions by this Court have continued to refer to truth as a defense. *See, e.g., St. Amant* v. *Thompson*, 390 U.S. 727, 731-732 (1968). Consider also the words of Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 151 (1967), that truth is "an absolute defense in almost all cases." *See also* the dissenting opinions of Justice Harlan and Justice Marshall in *Rosenbloom* v. *Metromedia, supra*, 403 U.S. at 65-66 and 86, n.12 (1971). The Reporter's Notes on § 613 of the *Restatement (Second) of Torts* at 150 (1981) characterizes as "contradictory" this Court's language on the question of the burden of proving the falsity of a defamatory communication. Although the plaintiff must prove a false publication, this is easily accomplished because the falsity of a defamatory communication is presumed at common law. *Restatement (Second) of Torts* § 518A, Comment B (1977). Showing a defamatory publication is different from bearing the ultimate burden of proof on the issue of falsity.

protect the First and Fourteenth Amendment rights of free expression. 374 U.S. at 271-272, 278-279.

Thus, the Court in *New York Times* sought to balance the right to free speech and freedom of the press with the right of a public figure to be free from injury to his reputation. Under the "reckless disregard" portion of the actual malice test, public figures are required to demonstrate a high degree of subjective awareness of probable falsity. *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 731; *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). Although "the defense of truth is constitutionally required where the subject of the publication is a public official or public figure," *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975), this does not mean that a public figure libel plaintiff is constitutionally required to bear the burden of proving falsity. Eaton, *supra*.

The inequity of requiring a public figure plaintiff in a libel action to prove falsity was clearly pointed out by the Pennsylvania Supreme Court:

> Common decency would seem to require that the defaming defendant have the burden of substantiating the accusations, especially when, in many instances, a defamed but innocent plaintiff may not be able to adduce more evidence than a denial that he or she committed the offense charged.

Corabi v. *Curtis Publishing Co.*, 441 Pa. 432, 468, 273 A.2d 899, 917 (1971).[12] Requiring a media defendant to prove truth after the plaintiff has made a *prima facie* case of libel with actual malice is the sounder public policy. As a practical matter, if the plaintiff fails to prove actual malice under *New York Times*, the defendant need not prove truth as a defense. However, the plaintiff's burden in establishing the defendant's conduct does not

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[12] *See also*, *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 386, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 1309 (1977) (Breitel, J., concurring), *cert. denied*, 434 U.S. 969 (1977). Judge Breitel argued that it is virtually impossible for a public official libel plaintiff to prove that he was not corrupt or probably not corrupt as charged in alleged defamatory communication.

eliminate the defendant's burden of proving the truth of a defamatory publication.[13] Conduct and content are not co-extensive.

Freedom of the press under the First Amendment does not include the absolute license to destroy lives and careers. *Gertz* v. *Welch*, *supra*, 418 U.S. at 339-41. The extraordinary protections afforded to the press by the First Amendment carry with them a type of fiduciary duty to exercise the protected rights responsibly. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 560 (1976). When the press violates this fiduciary duty, and when a public figure plaintiff can prove actual malice, then the injured party should be entitled to recover for damage to his reputation.[14]

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[13] The American Law Institute in a *caveat* to *Restatement (Second) of Torts* § 613 at 307 (1977) expresses "no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication." *See also*, § 581A and the Reporter's Notes at 478 (1981).

A number of courts have taken the position that where the constitutional privilege applies, the common law presumption of falsity disappears and the plaintiff has the additional burden of proving the statement false. *E.g.*, *Goldwater* v. *Ginzburg*, 414 F.2d 324, 338 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Farnsworth* v. *Tribune Co.*, 43 Ill.2d 286, 293, 253 N.E.2d 408, 412 (1969); *Reaves* v. *Foster*, 200 So.2d 453, 458 (Miss. 1967); *Autobuses Internacionales* v. *El Continental Publishing Co.*, 483 S.W.2d 506, 508 (Tex. Civ.App. 1972). *Cf. Trails West, Inc.* v. *Wolff*, 32 N.Y.2d 207, 214, 344, N.Y.S.2d 863, 866, 298 N.E.2d 52, 54 (1973).

[14] This Court has recognized that in our constitutional system, the state interest in protecting private personality is of coordinate value with First Amendment considerations:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individ-

In sum, this Court should review the Oklahoma Supreme Court decision and decide the extent to which federal constitutional law has supplanted substantive and procedural state law in libel actions.

II. ASSUMING THAT THE EDITORIAL CARTOON WAS DEFAMATORY AND A STATEMENT OF FACT, THERE WAS SUFFICIENT EVIDENCE OF ACTUAL MALICE FOR SUBMISSION OF THE LIBEL ISSUE TO THE JURY.

In its treatment of the editorial cartoon, the Oklahoma Supreme Court assumed, without deciding, that the publication was defamatory and a statement of fact. (App. 15a-16a) The Oklahoma Supreme Court incorrectly held that there was insufficient evidence of actual malice for the matter to be submitted to the jury.

As long as there is sufficient evidence by which a reasonable person might conclude that actual malice was shown with clear and convincing clarity, a jury may return a verdict against a publisher. Proof of actual malice calls into question a defendant's state of mind and does not lend itself to a "summary disposition." *Hutchinson* v. *Proxmire*, 443 U.S. 111, n.9 (1979) Although the Court in *Hutchinson* was discussing the tendency of certain courts to award summary judgment to defendants in libel cases, this holding is also applicable in considering the decision of the Oklahoma Supreme Court. If the state court had correctly applied the constitutional standards for libel, it would have upheld the verdict of a properly instructed jury. Deference to a jury's finding regarding a defendant's state of mind is appropriate because evidence of malice is a question of fact which only a jury can decide.[15] *Herbert* v. *Lando*, *supra*. "The finder of

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ual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Rosenblatt v. *Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

[15] In its ruling that the cartoon was not actionable, the Oklahoma Supreme Court summarized the publisher's testimony that OPUBCO

fact [and not the appellate court] must determine whether the publication was indeed made in good faith." *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 732.

Relying on *Gertz* v. *Welch*, *supra*, the Oklahoma Supreme Court ruled that OPUBCO's failure to investigate could not form the predicate for a jury finding of malice under *New York Times*. But the Oklahoma Supreme Court misread *Gertz*. (App. 17a) *Gertz* actually says that "mere proof of failure to investigate *without more*, cannot establish reckless disregard for the truth." 418 U.S. at 332 (emphasis added). In short, the Oklahoma Supreme Court failed to properly apply the constitutional law of actual malice. The applicable rule, set forth in *St. Amant* v. *Thompson*, states that "[f]ailure to investigate does not *in itself* establish bad faith." 390 U.S. at 733 (emphasis added). However, where there is sufficient question as to the accuracy of the publication to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication, then publishing with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice. *Id.*, at 731. "[T]he failure to investigate the truth or falsity of the defamatory statement is a fact, which when coupled with other circumstances, may prove, with convincing clarity, the defendant's reckless disregard for the truth." L. H. Eldredge, *The Law of Defamation* § 51 at 255-256 (1978).

The jury in concluding that OPUBCO had demonstrated a reckless disregard of the truth or falsity of its pub-

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did not intend to accuse Miskovsky of criminal libel. (App. 16a-17a) This focus on the intent of the publisher contradicts the evidence that OPUBCO sought to "blister" Miskovsky and disregards a long line of Oklahoma decisions that hold that defamation is determined not by the intent of the editor, but what readers reasonably believed the editor intended to convey. *E.g.*, *Wimmer* v. *Oklahoma Publishing Co.*, 1 P.2d 671 (1931). This distinction is particularly important where the cartoon has a double meaning. *Cf. Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U.S. 6, 19-20 (1970) (White J., concurring).

lications regarding petitioner was undoubtedly influenced by evidence of petitioner's eminent career in public service. Petitioner has practiced law for more than 40 years in Oklahoma and has often defended unpopular or controversial individuals and causes. He has held numerous public offices and was a serious candidate for the office of United States Senator. In view of petitioner's record and reputation, there were obvious reasons why the jury would naturally and logically conclude that OPUBCO must have had serious doubts about the truth of the charges. The evidence of failure to investigate, coupled with OPUBCO's motives in "blistering" petitioner in order to further the political career of its favored candidate, and the eminence of petitioner's career certainly demonstrated OPUBCO's reckless disregard for the truth.[16]

On facts similar to those found in petitioner's case, the United States Court of Appeals for the Second Circuit affirmed a libel judgment for Senator Barry Goldwater after considering what other circumstances, in addition to failure to investigate, might constitute actual malice.[17]

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[16] In *Garrison* v. *Louisiana*, *supra*, 379 U.S. at 75, this Court stated:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity . . . .
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> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be affected. . . .
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> * * * *
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> Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

[17] In *Carson* v. *Allied News*, 529 F.2d 206 (7th Cir. 1976), the court found sufficient evidence for a jury to decide if there was

Goldwater v. *Ginzberg*, *supra*, 414 F.2d at 339. Neither the *Goldwater* article nor the cartoon in question contained any "hot news" which might have presented a mitigating factor or would have excused haste in publishing; in fact, the Miskovsky cartoon was not news at all. In *Goldwater*, the court found that the publisher was very much aware of the possible resulting harm. Here the facts are even more egregious because the evidence is undisputed that OPUBCO was more than merely aware of the possibility that harm would result from its publication; OPUBCO affirmatively desired and sought to "blister" petitioner and his reputation to further the electoral prospects of its favored candidate. The publisher's intention "to get" Miskovsky is evidence of actual malice. *Stevens* v. *Sun Publishing Co.*, 270 S.C. 65, 240 S.E.2d 812 (1978), *cert. denied*, 436 U.S. 945 (1978). According to Assistant Managing Editor Robert E. Lee, OPUBCO intended that the cartoon convey the impression of a conspiracy.[18] (Vol. II, 36) In both the *Goldwater* and the *Miskovsky* publications the seriousness of the charges necessitated a thorough investigation. In *Goldwater*, the court faulted the media defendant for a "slipshod and sketchy" investigation. In *Miskovsky*, an investigation was held only *after* the cartoon was printed—an investigation which could easily have been arranged prior to publication.

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actual malice where the publication presented a substantial danger to the reputation of the individual who was the target of the attack and the information was not "hot news" that could not wait another day or two before publication. The court also weighed the opportunity of the publisher to investigate whether the "keystone" fact in the story was true.

[18] The uncontroverted evidence at trial showed that OPUBCO's efforts were successful and that readers interpreted the "puppet" cartoon in a defamatory way. Petitioner testified to numerous hate calls and to having received in the mail the cartoon containing epithets drawn upon it by a reader. (App. 22a) Further, Assistant Managing Editor Robert E. Lee testified that following publication of the cartoon, there was talk going around town and at City Hall that Miskovsky and Points had engaged in a conspiracy. (Vol. II, 26-27)

In sum, a failure to investigate, the absence of any "hot news" value, the publisher's intent to get Miskovsky, and the ease with which an investigation could have been conducted, all support the jury's conclusion that the cartoon was published with actual malice. The Oklahoma Supreme Court erroneously failed to consider these other circumstances, as required by *Gertz* and *St. Amant*. Accordingly, this Court should reinstate the jury's verdict.

III. ASSUMING THAT EXPRESSIONS OF PURE OPINION ARE CONSTITUTIONALLY PROTECTED UNDER *GERTZ* v. *WELCH*, THERE WAS SUFFICIENT EVIDENCE OF UNDISCLOSED DEFAMATORY FACTS IN THE THREE ARTICLES AND EDITORIAL FOR THE ISSUE OF LIBEL TO BE SUBMITTED TO THE JURY.

In deciding that the three newspaper articles and the editorial were not defamatory, the Oklahoma Supreme Court ruled that the contents of the articles and the editorial were not actionable because they were pure opinion rather than statements of fact.[19] The Oklahoma Supreme Court in its decision appears to rely on the federal Constitution since the court does not cite any state law. The court, however, refers to only one federal case to support its belief that no reader could have thought that the statements in OPUBCO's editorial in fact accused petitioner of committing criminal libel. With respect to the other findings of privileged opinion, the Oklahoma Su-

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[19] The rationale of the Oklahoma Supreme Court may be explained with reference to the view expressed in the *Restatement (Second) of Torts* § 566, Comment C (1977), which states that actions for defamation on the basis of an expression of pure opinion appear to have been rendered unconstitutional by *Gertz* v. *Welch*. In *Gertz*, this Court said:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. 418 U.S. at 339-340.

The Oklahoma Supreme Court incorrectly stated that Miskovsky in his brief conceded that statements of opinion are not actionable. (See App. 12a and Appellant's Brief at 38-42)

preme Court articulates no standard or rationale for determining what is opinion, mixed opinion and fact, or opinion which implies the existence of defamatory facts. It simply acted as the "thirteenth" member of the jury.

The full impact of *New York Times* and its progeny on the common law of defamation is unclear and this is an area where there is considerable confusion. For example, a leading commentator has said:

> Determining what is defamatory may have constitutional implications, although few cases have explored them. The theory seems to be that, as a matter of constitutional law, the First Amendment thumb is put on the balance in favor of finding expression to be non-defamatory.

R. D. Sack, *Libel, Slander, and Related Problems* 83 (1980). Other courts have also concluded that pure opinion is not actionable under the Constitution. *E.g.*, *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal.3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (1976); *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980); *Pease* v. *Telegraph Publishing Co., Inc.*, 121 N.H. 62, 426 A.2d 463 (1981). This Court, however, has never required the absolute privilege accorded here by the Oklahoma Supreme Court.[20]

In *Greenbelt Cooperative Publishing Association* v. *Bresler*, *supra*, 398 U.S. at 6, the only case cited by the Oklahoma Supreme Court in its discussion of opinion and defamatory meaning, Mr. Justice White addresses in his concurring opinion the issue of words with double meaning.

> Should *New York Times Co.* v. *Sullivan* . . . be extended to preclude liability for injury to reputation caused by employing words of double meaning, one of which is libelous, whenever the publisher claims in

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[20] Under Oklahoma law, whether a statement is defamatory is "measured by its natural and probable effect upon the mind of the average lay reader." *Wimmer* v. *Oklahoma Publishing Co.*, *supra*, 1 P.2d at 673.

> good faith to have intended the innocent meaning? I think not.
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> But it is quite a different thing, not involving the same danger of self-censorship, to immunize professional communicators from liability for their use of ambiguous language and their failure to guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the eyes of the average reader. I see no reason why the members of a skilled calling should not be held to the standard of their craft and assume the risk of being misunderstood—if they are—by the ordinary reader of their publication.

In concluding that the statement made by OPUBCO that "[a]llegations against Gov. David Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation" did not imply that petitioner brought up this issue on his own or in cooperation with Points, the Oklahoma Supreme Court relied upon one of several dictionary definitions of the word "raised." (App. 12a) It is clear that there are other meanings for the word "raised" and that a reader might reasonably conclude from the use of the word that petitioner stirred up the issue on his own or in a conspiracy with Points. This is particularly true when the statement is immediately combined with the republishing of untrue statements made by others accusing Miskovsky of actually making the allegations. (App. 10a-12a) The determination of the meaning attached to such words was properly left to the jury.

The Oklahoma Supreme Court mistakenly relied on *Greenbelt Cooperative Publishing Association*, *supra*, in dismissing petitioner's libel claim relating to the editorial. In *Greenbelt*, the Court decided that the word "blackmail" was not libelous, but reached this conclusion only after considering all of the circumstances, which are sharply different from those found here. *Id.*, at 13. The Court found that the use of the word "blackmail" constituted an "accurate and truthful report(s) of what

had been said at a public hearing." *Id.*, at 12. The word was used in an article discussing a public debate whereby the paper was "performing its wholly legitimate function." *Id.*, at 13. This Court did not decide in *Greenbelt* that expressions of opinion could *never* be libelous. The Court concluded only that the use of the word "blackmail" was not defamatory in an article where no reader could have thought that the plaintiff was actually being charged with "blackmail" and where the defendant was printing "accurate and truthful reports." [21] The facts in *Miskovsky* are sharply different because OPUBCO was not merely reporting what had been said, but was accusing petitioner of "scurrilous defamation"; OPUBCO was editorializing in order to subvert Miskovsky's candidacy for public office and was not fulfilling its traditional First Amendment role.

The third newspaper article entitled "Boren's Friends Express Disgust" also contains defamatory statements because OPUBCO repeated a comment made by Ward Lynn that Miskovsky was the "hatchet man" in the campaign. This characterization is not pure opinion protected by the First Amendment because a typical reader could easily have concluded that petitioner was being charged with illegal or immoral acts. The jury could have concluded that OPUBCO printed the comment made by a partisan individual who was not part of the campaign because doing so was useful to OPUBCO's plan to "blister" Miskovsky.

Also, the newspaper editorial, in addition to characterizing Miskovsky's words as "scurrilous defamation," accuses petitioner of "gutter theatrics" and states that he is a "defender of scoundrels." [22] Contrary to the view of

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[21] In circumstances different from those in *Greenbelt* the question of whether a reference to "blackmail" constituted an accusation of a crime was left for the jury to decide. *Good Government* v. *Superior Court*, 22 Cal.3d 672, 150 Cal. Rptr. 258, 586 P.2d 572, 576 (1978), *cert. denied*, 441 U.S. 961 (1979).

[22] OPUBCO did not controvert the evidence Miskovsky presented at trial that he has never engaged in gutter theatrics in the court-

the Oklahoma Supreme Court, these are not constitutionally protected statements of opinion. In the totality of the circumstances, the characterization of petitioner's words as "actionable" falsely accuses petitioner of criminal libel. Courts and commentators have concluded that expressions of opinion mixed with fact and statements of opinion which imply the existence of undisclosed defamatory facts do not enjoy the protection of the First Amendment. *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Restatement (Second) of Torts* § 566. In sum, the Oklahoma Supreme Court opinion erroneously decided that the Constitution rendered OPUBCO's publications not actionable and accordingly should be reviewed by this Court.

IV. THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT A RULE OF LAW WHICH GRANTS VIRTUAL ABSOLUTE IMMUNITY TO A MEDIA DEFENDANT FROM LIBEL SUITS BROUGHT BY A PUBLIC FIGURE BECAUSE SUCH A RULE WOULD CHILL THE FIRST AMENDMENT RIGHTS OF PETITIONER AND OTHER CANDIDATES FOR PUBLIC OFFICE.

The First Amendment fulfills an important function in our society in preserving the integrity of the electoral process. As this Court has observed, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of gov-

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room and has never been a defender of scoundrels. Nor did OPUBCO dispute Miskovsky's evidence that there never was any conspiracy between himself and Points. (Vol. I, 39, 54-55) The conclusion that these accusations were leveled at Miskovsky without any subjective belief or concern for whether or not they were true is inescapable. As Chief Justice Burger noted:

> [T]he advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors . . . . *Gertz* v. *Welch*, *supra*, 418 U.S. at 355 (Burger, C.J., dissenting).

ernment established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). The constitutional guarantee of freedom of speech "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 52. "Democracy depends on a well informed electorate, not a citizenry . . . limited in its ability to discuss and debate candidates and issues." *Id.* at 49, n.55. Further, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 776, 782 (1978); *Cf. Pell* v. *Procunier*, 417 U.S. 817 (1974). "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Id.*, at 802 (Burger, C. J., concurring), citing *Pennekamp* v. *Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'" *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), cited in *Bellotti*, *supra*, 435 U.S. at 777, n.12. The Oklahoma Supreme Court decision overturning the libel verdict in favor of petitioner infringes upon petitioner's First Amendment rights and encourages OPUBCO to limit public debate in future elections.

The evidence presented at petitioner's trial clearly demonstrates that OPUBCO sought to "blister" petitioner in a race for public office by knowingly publishing defamatory falsehoods about him in order to limit debate on public issues and to infringe on petitioner's First Amendment rights. A jury of Oklahoma citizens correctly understood OPUBCO's intent and responded with the largest jury verdict in favor of a candidate for political office in the United States. While awarding petitioner

actual damages of $35,000, the jury sought to deter OPUBCO from violating the First Amendment rights of other candidates for public office by awarding exemplary damages of $965,000.

The Constitution serves significant societal interests and often protects interests broader than those of the party seeking their vindication. As this court emphasized in *Bellotti*, *supra*, 435 U.S. at 776:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940).

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 48-49.

The Oklahoma Supreme Court struck down this verdict of a properly instructed jury that had seen and heard persuasive evidence of OPUBCO's improper conduct. To allow the Oklahoma Supreme Court decision to stand would effectively grant OPUBCO immunity and permission to knowingly defame and villify any candidate not to its liking under the cloak of the First Amendment.[23]

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[23] OPUBCO has not lost a libel case since 1927 when a $1000 jury verdict in favor of a municipal judge was upheld on appeal. *Oklahoma Publishing Co.* v. *Tucker*, 254 P. 975 (Okla. 1927). There are six other reported libel cases against OPUBCO, all brought by public figures, but none in the past fifty years. *Cobb* v. *Oklahoma Publishing Co.*, 140 P. 1079 (Okla. 1914); *Matthews* v. *Oklahoma Publishing Co.*, 219 P. 947 (Okla. 1923); *Oklahoma Publishing Co.* v. *Kendall*, 221 P. 762 (Okla. 1924); *Oklahoma Publishing Co.* v. *Gray*, 280 P. 419 (Okla. 1929); *Wimmer* v. *Oklahoma Publishing Co.*, *supra*.

According to a recent survey, plaintiffs suing media defendants fare badly and win judgments in only 5% of the media appeals. The survey included only reported cases, most of which were appellate cases. Therefore, the survey seems to overstate the likelihood of a successful suit for libel by a public figure because defendants

Further, to allow the decision to stand will discourage many good men and women from entering the political arena for fear of becoming subject to the same type of attack by irresponsible members of the press.

"The authors of the Bill of Rights did not undertake to assign priorities" to constitutional rights. *Nebraska Press Association* v. *Stuart*, *supra*, 427 U.S. at 561. Nor did the authors of the Bill of Rights intend that freedom of the press vested in a multi-media conglomerate be abused with impunity and with immunity in such a fashion as to stifle petitioner's First Amendment rights.[24] The policies and political principles underlying the Bill of Rights require a balancing between petitioner's right to protect his reputation and to speak freely during a campaign for public office and OPUBCO's right of fair comment. The grant of virtual absolute immunity to OPUBCO would require a candidate who runs for public office without OPUBCO's endorsement to sacrifice his right of free speech and his right to his good name as a condition of candidacy, contrary to *Nebraska Press Association*.[25] Accordingly, this Court should grant review

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are much less likely to accept adverse judgments at the trial level than are plaintiffs. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, Am. Bar Foundation Research J., 493, 498 (Summer 1980).

[24] In its attack on petitioner, OPUBCO is also restricting the access of Oklahomans to the ballot, effectively burdening two separate rights—"the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams* v. *Rhodes*, 393 U.S. 30 (1968), cited in *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). By infringing on petitioner's rights, OPUBCO "impairs the voters' ability to express their political preferences." *Id.* In his action for defamation petitioner thus seeks to vindicate these rights as well.

[25] State constitutions approved contemporaneously with the passage of the Bill of Rights do not reveal any settled belief that civil awards of damages for defamation were inconsistent with the right of free speech and free press; in fact, some state constitu-

in this case to protect the First Amendment rights not only of petitioner, but of all Oklahoma citizens.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Supreme Court of Oklahoma reversed with directions that the judgment of the District Court of Cleveland County, Oklahoma, be reinstated.

Respectfully submitted,

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tional provisions adopted in the late eighteenth and early nineteenth centuries expressly stated that the rights of free speech and free press could be abused by defamation. L. H. Eldredge, *supra*, § 49 at 248. Neither did the states intend to modify their own laws concerning defamation when they ratified the Fourteenth Amendment. *Id.*, at 251.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 55826

MISKOVSKY,

Appellee,

v.

OKLAHOMA PUB. CO.,

Appellant.

January 12, 1982

Appeal from District Court, Cleveland County; Preston A. Trimble, Judge

Appeal from a jury verdict awarding compensatory and punitive damages in a libel case to appellee. We find that the evidence of defamation, falsehood and malice presented by appellee was insufficient to permit the submission of the cause to a jury. Reversed and remanded with instructions.

Everett J. Sweeney and E. Joe Lankford, Norman, and Carroll E. Gregg, Oklahoma City, (Of Counsel), David A. Anderson, Professor of Law, University of Texas, Texas Law School, Austin, Tex., for appellee.

David Machanic, Michael Minnis, Pierson, Ball & Dowd, Oklahoma City, and Tom A. Lucas of Lucas & Cate, Norman, for appellant.

BARNES, V.C.J. The dispositive issue in this cause is whether the evidence presented by a candidate for the United States Senate, George Miskovsky, in a libel action against a local publisher, Oklahoma Publishing Company (OPUBCO), was sufficient to permit the submission of the cause to a jury. We hold that it was not.

The facts of the cause before us are as follows: In August of 1978, eight Oklahomans had become candidates for the Democratic nomination for the office of the United States Senate. Among the candidates were, then Governor, David Boren, former State Senator and Representative, George Miskovsky, and Anthony Points, a newcomer to the political arena. During the campaign, Mr. Miskovsky, along with other candidates, was invited to attend a candidates' forum conducted by the Women's Democratic Club of Canadian County in El Reno, Oklahoma. Although Mr. Miskovsky, Mr. Points, and another candidate, Mr. Bridges, accepted the invitation, other Democratic candidates did not attend the forum, which was held at the Ponderosa Restaurant. During the forum, each candidate was invited to make a brief statement. While addressing the group, candidate Points read from a political flyer, copies of which he had distributed to the audience. In part the flyer read:

> "I am against homosexuals or bisexuals in office or government. They are threats to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.
>
> "There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Borden frequents with homosexuals and I'm putting it lightly.
>
> "I don't think that is what you want for a U.S. Senator."

In addition to reading these remarks, candidate Points categorically stated that "Governor David Boren is a homosexual."

Mr. Miskovsky, on the following day, August 10, 1978, delivered a letter to the office of Governor Boren in which he set forth Mr. Points' charges against Boren, asking

the Governor to answer several questions. That letter read as follows:

"The Honorable David Boren
Governor State of Oklahoma
State Capitol
Oklahoma City, Oklahoma

Dear Gov. Boren:

Yesterday I attended a noon meeting of the Canadian County Democratic Women's Club at the Ponderosa Restaurant in El Reno. About three dozen members of the club were present as well as club vice president, Mrs. Donald J. (Floretta) Cholston of El Reno, and two other Democratic candidates for the U.S. Senate, Dean Bridges and Anthony Points.

I was called upon to address the group about issues and I did, as did Mr. Bridges.

Mr. Points addressed the group and distributed a campaign flyer (a copy of which is enclosed herewith) containing the following verbatim transcript: 'I am against homosexuals in the school system. They are a threat to our children. They are like vultures 'preying' on our young.'

'I am against homosexuals or bisexuals in office or government. They are a threat to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homoxesual identity kept secret.'

'There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.'

'I don't think that is what you want for a U.S. Senator.'

In addition to distributing the above written bulletin, Mr. Points added, among other things, the oral categorical statement, 'David Boren is a homosexual.'

After the meeting one of the ladies said she had not heard of this before, and others said they had heard rumors about the charge.

It is the first time I have heard this direct, categorical statement made in public by a candidate for the U.S. Senate.

For this reason I am asking you to respond to the following questions:

Do you know what a homosexual or bisexual is?

Are you a homosexual or bisexual?

Have you ever been a homosexual or bisexual?

Have you ever engaged in homosexual or bisexual activity?

I believe it is the right of every citizen, if it can be ascertained, to know if a candidate for U.S. Senator is afflicted with this kind of abnormal behavior.

A U.S. Senator has access to highly sensitive information vital to the defense of this country and our NATO allies.

I believe it is the right of every citizen to know if a candidate is afflicted with any physical, mental or philosophical weakness that might be dangerous to our national security or which might jeopardize the best interests of the majority of the people.

If a candidate is a homosexual, a person who is mentally deranged or a person of bizarre philosophical demeanor, then, the people have a right to know it.

And the candidate should disclose it in order to protect his effectiveness as the representative of the majority and free himself from any politically moti-

vated intrigue, blackmail, extortion or compromise to prevent disclosure of his true identity.

The people are entitled to an immediate response. Such response should be subscribed by you under oath.

Sincerely,

George Miskovsky"

The letter was delivered to the Governor's office approximately ten minutes prior to a press conference held by Mr. Miskovsky. At the press conference, Mr. Miskovsky told members of the press and the media of Mr. Points' statement and of his letter to the Governor.

In preparation for the press conference, Mr. Miskovsky's press agent personally called various members of the media, telling them that this was going to be a "hot" press conference that would be worthy of their attention.

Governor Boren, who was out on the campaign trail, and away from the Capitol, upon hearing of Miskovsky's press conference, flew back to Oklahoma City and held a make-shift press conference at Wiley Post Airport, categorically denying the charges against him.

The next day, August 11, 1978, the Oklahoma Publishing Company (OPUBCO), publisher of *The Daily Oklahoman*, a morning paper, and *The Oklahoma City Times*, an evening paper, published three news articles and an editorial dealing with Mr. Points' charges, Mr. Miskovsky's press conference, and the Governor's response to these events. A few days later, OPUBCO also published an editorial cartoon lampooning Miskovsky's actions. These five publications—three news articles, an editorial, and an editorial cartoon—are the publications which Mr. Miskovsky claims libeled him.

I.

Before addressing the issues presented, we will first discuss the burden which Mr. Miskovsky was required to

meet in order to have his case presented to a jury. Because Mr. Miskovsky admits that for the purposes of this libel action, he is a "public figure", there is no question that the *New York Times v. Sullivan* standards are applicable in this cause. In *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), in considering a libel action brought by an elected Commissioner of the City of Montgomery, Alabama—a public official—the United States Supreme Court, in discussing the right of free speech and free press guaranteed by the First Amendment to the United States Constitution, noted that cases such as the one before us are considered against ". . . . a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The Court then went on to note that an ". . . . erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have 'breathing space'. . . ."

The Court later quoted with approval language of Justice Burch of the Supreme Court of Kansas in *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), stating:

> " 'It is of the utmost consequence that the public should discuss the character and qualifications of candidates for their suffrages. The importance to the State and to society of such discussion is so vast, and *the advantages derived are so great, that they more than counterbalance the inconvenience of private persons* whose conduct may be involved, and *occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.* The public benefit from publicity is so great, and the chance of injury to private character is so small, that such discussion

must be privileged.'" (78 Kan. at 725, 98 Pac. at 286.) [Emphasis added]

Based upon our "profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open," and the "breathing space" needed to protect the freedoms of expression, the United States Supreme Court held that the constitutional guarantees required a Federal rule which prohibited public officials from recovering damages in libel actions, unless certain prerequisites were met. The Court stated:

> "The constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 279-80, 11 L. Ed. 2d at 706, 84 S. Ct. at 726.)

This "New York Times standard" was later found to apply not only to public officials, but also "public figures".[1] As Mr. Miskovsky was a public figure, the standard quoted above applies in the case at hand. Thus, in order to prevail, Mr. Miskovsky must show:

(1) The publication of a defamatory statement;

(2) That the defamatory statement was false; and

(3) That the defamatory falsehood was made with "actual malice"—made with knowledge that it was false, or with reckless disregard of whether it was false or not.

In discussing the element of "actual malice", the United States Supreme Court, in *New York Times v. Sullivan*, held that the Constitution demanded that malice be shown with "convincing clarity".[2] Additionally, the Supreme Court noted that there was evidence that the New York Times published the alleged libelous publication without

checking its accuracy against the news stories in the Times' own files. In rejecting the plaintiff's contention that such failure to check constituted sufficient evidence of malice, the Court stated:

> ". . . . The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the person in the Times' organization having responsibility for the publication of the advertisement.*"

Thus, we see that Mr. Miskovsky, in order to prove malice, must not only show that the state of mind required was brought home to the persons in OPUBCO's organization having responsibility for the publication of the alleged libelous publications, but must also do so with convincing clarity.

The constitutionally mandated proof of "actual malice" was further defined in *St. Amant v. Thompson*, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968). In that case, the Court noted that although "reckless disregard" could not be fully encompassed in one infallible definition, it did require that a defendant entertain some doubt as to the truth prior to publication, stating:

> ". . . . Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication.* Publishing with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice." (390 U.S. at 731, 20 L. Ed. 2d at 267, 88 S. Ct. at 1325.)

In so ruling, the Supreme Court went on to note that:

> ". . . . Concededly, the reckless disregard standard may permit recovery in fewer situations than would

a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times, and succeeding cases, has emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censureship and thus adequately implement the First Amendment policy." (390 U.S. at 731-32, 20 L. Ed. 2d at 267, and 88 S. Ct. at 1326.)

II.

In *New York Times v. Sullivan*, the Court states:

". . . . This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases view the evidence to make certain that these principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" (370 U.S. at 285, 11 L. Ed. 2d at 798, 84 S. Ct. at 728.)

Like the U.S. Supreme Court, we also, in proper cases, must review the evidence to make certain that constitutional principles have been correctly applied. The case before us is such an instance. After reviewing the evidence, we conclude that with respect to each publication, Mr. Miskovsky has failed to present evidence of defamation, falsehood, and malice, sufficient to present the issue to a jury.

We will first examine the three news articles which Mr. Miskovsky argues were defamatory.

The first article which allegedly defames Mr. Miskovsky appeared in The Daily Oklahoman on August 11, 1978, with the headline, "Sex Charge a Lie, Governor Boren Replies". This article was a straightforward

account informing the reader that candidate Miskovsky had called a press conference, and that Mr. Miskovsky had asked Governor Boren to answer accusations made by another candidate that Boren was a homosexual. The article goes on to detail statements made by Mr. Points, Governor Boren's denial of the charges. Additionally, the article quoted from portions of Mr. Miskovsky's letter to Governor Boren, and reported reactions to the accusations and Mr. Miskovsky's letter, by both Governor and Mrs. Boren. Miskovsky argues that within this article the seed of conspiracy between him and Points is planted in the public's mind when the article stated:

> "Asked if he thought Miskovsky and Points worked together to discredit him, Boren replied, 'I will just have to leave that to your own speculation.'"

We simply find no merit to Mr. Miskovsky's position that the article, because of the above quoted paragraph, is libelous. The statement quoted is neither false nor defamatory. Because Mr. Miskovsky used Mr. Points' statements, it is understandable that the news media might wonder if Mr. Miskovsky and Mr. Points were working together. It was certainly not libelous to inquire of the Governor whether he thought such could be the case, nor was it libelous to report the Governor's response. The statement does not defame Mr. Miskovsky, as it neither holds him up to ridicule, scorn, or contempt. Nor can the statement be said to be libelous, because the statement is not false. For these reasons, we hold that the trial court erred in permitting the jury to consider this publication as possibly libelous.

The second article, entitled "Allegations Stir Storm", which also appeared in the August 11 issue of The Daily Oklahoman, began with the following lead:

> "Allegations against Gov. David Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation Thursday in the news media, were deplored by two

other candidates and prompted a flurry of support at Boren campaign headquarters."

Continuing, the article chronicled reactions to the events of the past day, quoting from various newspaper articles and radio broadcasts across the State. The article also reported the reactions of Governor Boren's campaign secretary, and the reactions of several other senatorial candidates. Among reactions chronicled were the following:

> "Rob Pyron, Boren's campaign secretary, said campaign headquarters was swamped with calls Thursday afternoon from persons voicing support for the governor and anger over the allegations of Points and Miskovsky.
>
> • • • •
>
> "Oklahoma City radio station KTOK said the names of Miskovsky and Points should be stricken from the election ballot.
>
> " 'Such loathsome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points would lend to the U.S. Senate if they were elected.'
>
> "The Shawnee News-Star editorialized in Friday editions that the charge that Boren is a homosexual 'would be more at home on the walls of a 'saloon toilet'.
>
> • • • •
>
> " 'Cesspool allegations have no place in the political arena. We believe George Miskovsky has no place in it any longer either.' "

Mr. Miskovsky argues that the above quoted statements are falsehoods which are defamatory. He argues that the allegations against Governor Boren were not made by him, but rather by Anthony Points alone. Thus, Miskovsky concludes that any suggestion that he made

the allegations is false, and defames him because it accuses him of a crime—criminal libel.

In addressing these contentions, we would first note that the statement that the allegations against Governor Boren were "raised" by George Miskovsky and Anthony Points is not a false statement. The American Heritage Dictionary of the English Language defines the word "raised" to include "increasing in strength or intensity, and arousing or stirring up." To say that Mr. Miskovsky did not increase the intensity of the allegations made by Mr. Points would be sheer nonsense. It was, after all, Mr. Miskovsky who called Mr. Points' statements to the public's attention. It was, after all, Mr. Miskovsky who called the press conference to discuss that very issue. And it was Mr. Miskovsky who wrote the Governor asking him to respond to the allegations.

The newspaper article also carefully pointed out that Mr. Miskovsky used Points' campaign material as the basis for "implications" of homosexuality. Thus, to report that various people in organizations across the State were disgruntled over the allegations of Mr. Points and Miskovsky could hardly be said to be false, for it was Miskovsky who took the utterances of a minor candidate and publicized them, making them a cause celebre. To hold that Mr. Miskovsky's actions could not be taken as implications of homosexuality would be a denial of the obvious.

With respect to the other statements in the article, in which OPUBCO reported that other news media had referred to Mr. Miskovsky's action as having won him "a place in state history saying he 'took the prize for the filthiest stunt that has ever been played by a serious candidate for major public office in this state' ", are simply all statements of opinion, which even Miskovsky admits in his brief are not actionable. As opinions they are not statements of fact, and therefore cannot be false.

For the above stated reasons, we hold that it was error to submit the article entitled "Allegations Stir Storm" to the jury, allowing them to find that this article had defamed Miskovsky.

The third and last news article was published by OPUBCO in The Oklahoma City Times on August 11, 1978. It was entitled "Boren's Friends Express Disgust". The article's lead read:

> "Longtime friends and close associates of Gov. David Boren expressed shock and disgust in his hometown today after allegations surfaced Thursday that he is a homosexual."

The article then went on to quote the reactions of several Seminole citizens, among them Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron. It is the reporting of Mr. Lynn's comments which Mr. Miskovsky objects to, and characterizes as false and libelous. The paragraph dealing with Mr. Lynn's reaction read as follows:

> "Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron, said he expected Miskovsky to be the 'hatchet man' in the campaign."

Although we can appreciate why Mr. Miskovsky is not fond of the epithet "hatchet man", such an epithet is not libelous because it is not a statement of fact, but rather a judgmental statement in which the maker of the same expresses his views. It is similar to calling someone a "scalawag", a "rake", or a "scoundrel". Such statements are opinionative and not factual in nature. Thus, such statements can hardly be said to constitute falsehoods. As they canont be false, they cannot be considered libelous. Thus, once again the trial court erred in submitting this article to the jury, allowing the jury to find such statements to be libelous.

We next turn to the editorial and editorial cartoon which Mr. Miskovsky argues libeled him. The editorial

cartoon, entitled "Miskovsky and Mud", appeared in The Daily Oklahoman on Friday, August 11, 1978. The editorial started out with the statement that:

> "George Miskovsky has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing.
>
> "In a press conference reported on elsewhere in The Oklahoman, the septuagenarian lawyer has attempted to inject some sign of vitality in his moribund campaign for the Democratic nomination for the U.S. Senate.
>
> "His tactic was to indirectly suggest, in the form of a letter asking questions, that Gov. David Boren has homosexual tendencies.
>
> "Were it not for the fact that American Law and tradition make it virtually impossible to libel or slander a political figure, Miskovsky's words would be actionable. As it is, they are merely despicable and stupid."

The editorial went on to state that it is on the record and on the positions taken on national issues that Boren's Senate candidacy should be weighed, and not ". . . . on the scurrilous defamation hurled by Miskovsky . . . . Miskovsky should save his gutter theatrics for the next time he is defending some scroundel in criminal court . . . ."

As above, opinionative statements, such as "scurrilous defamation" and "gutter theatrics" are not statements of fact, but statements of opinion. What one individual may consider scurrilous, another may think commendable. What one might consider "gutter theatrics", another may think of as "strategical genuis". Likewise, one might refer to an individual as a "scoundrel", while another thinks him a "saint". Such characterizations are not factual, but rather judgmental. Accordingly, they can-

not form the basis of a libel action, as they cannot be verified as true or false.

Lastly, the characterization of Miskovsky's words as "actionable" we do not believe accuses Mr. Miskovsky of a criminal action. In so holding, we would note that in *Greenbelt Coop. Pub. Asso. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1977), the Supreme Court of the United States held that under the circumstances of that case, as a matter of constitutional law, it was clear that no reader could have thought that because of the use of the word "blackmail", the plaintiff was being charged with the commission of a criminal offense. We think it equally clear in the case at hand that no reasonable reader could have interpreted the statement that Mr. Miskovsky's words were actionable as imputing a criminal act to Mr. Miskovsky. In so holding, we note that no evidence at the trial was introduced to show that any reader interpreted the statement to have imputed the commission of criminal libel on Mr. Miskovsky's part. Accordingly, we cannot say that the statements in the editorial entitled "Miskovsky and Mud" could form the basis of a libel action. The court thus erred in submitting this article to the jury.

The last publication relied upon by Mr. Miskovsky in his libel action was an editorial cartoon published in The Oklahoma City Times on August 14, 1978. That cartoon is pictured below.

Mr. Miskovsky's position is that the cartoon is a direct representation that he put Points up to calling Governor Boren a homosexual, and that he was conspiring with Points, and that Miskovsky masterminded the conspiracy. Additionally, Miskovsky argues that the cartoon is defamatory, as it falsely imputes that he committed a crime—a criminal libel.

Without deciding, and even assuming, that the meaning attributed to the cartoon of Miskovsky was defama-

'Isn't that right, Anthony?'

tory and a statement of fact, there was no evidence that it was published with knowledge of falsity or with reckless disregard as to the truth of the cartoon.

Mr. Standard, who approved the cartoon for publication, testified that he saw the cartoon as showing a connection between Mr. Miskovsky and Mr. Points at the

press conference, but not prior to the press conference. He testified that:

> "Obviously, Mr. Miskovsky used Mr. Points as his whole excuse for calling the press conference and sending a letter to the Governor, and to that extent, sure, there was a connection."

As to the artificial halo over Mr. Miskovsky's head, Standard thought this denoted a self-righteous attitude on Miskovsky's part. To Standard, it meant that "Miskovsky was attempting to escape responsibility by, at the press conference, making it appear that Mr. Points had caused all of this, rather than Mr. Miskovsky."

Additionally, the cartoonist who drew the cartoon testified that his purpose in the cartoon was to comment on Miskovsky's asking Boren the four questions at the press conference. He "intended to show that Mr. Miskovsky was exploiting the words of Mr. Anthony Points." He further testified that when he drew the cartoon he did not intend to imply, nor did he think he implied, that Mr. Miskovsky was responsible for Mr. Points' statements. Mr. Lowe, the cartoonist, also testified that it did not enter his mind that the cartoon could be interpreted that way. While Mr. Miskovsky did show that the newspaper was out to "blister" him for his actions, and that the newspaper did favor Mr. Boren's candidacy over his, there simply was no evidence introduced to show that the paper intended to use false statements, or that the paper had any serious doubts as to the statements they published.

Lastly, even assuming further that the cartoonist or the person who approved the cartoon intended the meaning attributed to it by Miskovsky, there was no evidence that OPUBCO, at the time of publication, knew the meaning was false. The mere failure to investigate cannot establish reckless disregard for the truth; rather, those responsible for the publication of the cartoon must

act with a "high degree of awareness of . . . . probable falsity."[4] The evidence in this case did not reveal that OPUBCO had cause for such an awareness at the time of publication of the cartoon.

For the above stated reasons, we hold that the trial court erred as a matter of law in submitting the cause to the jury, as it was error to submit any of the five publications relied upon to the jury.

Accordingly, the action of the trial court is reversed, and the case is remanded to the trial court with directions to enter judgment for appellant OPUBCO.

It is so ordered.

IRWIN, J.J., HODGES, LAVENDER, SIMMS and HARGRAVE, JJ., and BACON and BOYDSTON, S.J., concur. DOOLIN, J., dissents.

Upon the disqualification of Justice WILLIAMS and Justice OPALA, the Honorable Kenneth D. BACON and the Honorable John D. BOYSTON were assigned to act as Special Justices in this case.

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[1] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971). See *Washington v. World Publishing Co.*, 506 P.2d 913, 916 (Okla. 1972) (candidate for United States Senate a public figure).

[2] 376 U.S. at 285-86, 11 L. Ed. 2d at 710, 84 S. Ct. at 729. Also see *Beckley Newspapers Corporation v. Hanks*, 289 U.S. 81, 19 L. Ed. 2d 248, 88 S. Ct. 197 (1967).

[4] *Gerty* (sic) *v. Welch*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Tuesday, April 6, 1982

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * * *

55,326 The Oklahoma Publishing Company v. George Miskovsky.

Rehearing denied.

CONCUR: Irwin, C.J., Barnes, V.C.J., Hodges, Lavender, Simms, Hargrave, JJ. and Bacon, Boydston, S.JJ., sitting in place of Opala and Williams, JJ. who disqualified.

DISSENT: Doolin, J.

* * * *

/s/ Pat Irwin
Chief Justice

APPENDIX C

Oklahoma City, OK Friday, August 11, 1978

SEX CHARGE A LIE, GOV. BOREN REPLIES

[Picture Omitted in Printing]

By Ed Montgomery and Michael Lee

U.S. Senate candidate George Miskovsky asked Gov. David Boren Thursday to answer an accusation by another candidate that Boren is a homosexual. Boren called the accusation "a vicious lie."

Miskovsky, one of Boren's opponents in the Aug. 22 Democratic primary, said a third candidate, Anthony Points, had stated flatly Wednesday that Boren is a homosexual.

If Points did, Boren countered, it was "a vicious lie."

At a hastily called press conference about 6 p.m. Thursday, at Wiley Post Airport in Oklahoma City, Boren said "I have been under much scrutiny since holding public office. People know how I've conducted myself publicly and privately."

Before returning from Woodward where he was campaigning Thursday afternoon, Boren said, "The statement is utterly ridiculous and categorically untrue. I don't know Mr. Points, but if he repeated such a vicious lie, I would not care to know him."

At a press conference, Miskovsky, former state senator and Oklahoma City attorney, distributed a two-page letter to Boren and a Points leaflet.

Miskovsky said Points had handed out the leaflet Wednesday at a meeting of the Canadian County Democratic Women's Club in El Reno.

In addition, Miskovsky said, Points made the statement, "David Boren is a homosexual."

Miskovsky would not say whether Points offered any proof, and Points could not be reached for comment Thursday night.

Mrs. Donald J. Gholston of El Reno, vice president of the club, confirmed Points made the statement. She said he offered no proof.

The Points leaflet distributed by Miskovsky said in part, "There is a side to David Boren that is a known fact in legal and political circles, and that's the fact that David Boren frequents with homosexuals and I'm putting it lightly. I don't think that is what you want for a U.S. senator."

Miskovsky's letter asked Boren to answer four questions, including one which asked, "Are you a homosexual or bisexual?"

Boren responded, "It is a shame a person has to be subjected to this kind of personal attack in order to serve the public. I particularly resent the statement because it reflects on the reputation of my wife, children and family as well as myself.

"This kind of tactic just makes even clearer to the people the contrast between their campaigns and the clean, positive campaign that I intend to continue."

Asked if he thought Miskovsky and Points worked together to discredit him, Boren replied, "I just have to leave that to your own speculation."

Boren was greeted at the airport by his wife Molly, and about 100 supporters who broke into a chant of "we want Boren" as he stepped from a plane.

Commenting on the statements, Mrs. Boren said, "I think that shows some of the other candidates are not winning on the issues."

She called the statements "character assassination."

Boren said he is "not surprised at anything that might happen." He said he will not change his campaign and will continue to run a "clean and positive campaign on the issues. Voters aren't interested in this kind of trash."

Miskovsky said he believes his questions to Boren are justified because the allegations were made by a candidate in a public meeting. These are his questions:

"Do you know what a homosexual or bisexual is?

"Are you a homosexual or bisexual?

"Have you ever been a homosexual or bisexual?

"Have you ever engaged in homosexual or bisexual activity?"

Miskovsky said he believes the public has a right to know if a candidate for the U.S. Senate has any "physical, mental or philosophical weakness" which might be dangerous to national security.

Boren, now 37, was the youngest governor in the nation when he was elected in 1974. He was divorced during his first year in office by his first wife, the former Janna Little of Madill. They had two small children.

The governor married Molly Shi of Ada on Nov. 27 in the governor's mansion.

Rob Pyron, Boren's campaign secretary, said the governor was campaigning in Alva and Woodward when he learned of the statements. "We contacted him by phone and he decided to come in and make a statement."

Pyron said the governor had planned to return to Oklahoma City Thursday evening and didn't break any commitments to hold the press conference.

APPENDIX D

Oklahoma City, OK Friday, August 11, 1978

MISKOVSKY, POINTS LASHED

ALLEGATIONS STIR STORM

Allegations against Gov. David Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation Thursday in the news media, were deplored by two other candidates and prompted a flurry of support at Boren campaign headquarters.

Also, Senate candidate Rosella Pete Saker, Altus, disclosed Points, whose campaign material Miskovsky used as basis for his implications of homosexuality, had raised the allegations against Boren in a phone conversation earlier this week.

Saker said Points "mentioned the probability that we'd be last, and maybe a few of us should get together and support one candidate."

He said when Points raised the Boren allegations in the conversation, "I told him that I didn't want to discuss it unless he had something other than accusations.

"I told him I wasn't interested in that type of thing," Saker said. "I feel a person that does that is riding a dirty trail."

Former U.S. Rep. Ed Edmondson, also a candidate for the Democratic nomination, said, "I really believe the charge is one unworthy of comment.

"I would hope the race will be decided on the issues before the people—the public issues, the public questions and the public records of the candidates."

The other Democratic candidates, Dean Bridges of Claremore and state Sen. Gene Stipe of McAlester, were

campaigning in western Oklahoma and could not be reached for comment.

Rob Pyron, Boren's campaign secretary, said campaign headquarters was swamped with calls Thursday afternoon from persons voicing support for the governor and anger over the allegations of Points and Miskovsky.

"The governor's personal secretary was alone here for about 35 minutes during the press conference and she said the three lines were going constantly," he said.

Pyron said some friends from law school were with the governor when the call came in about Miskovsky's statement, and they, plus others who called in later, have offered support and assistance in any legal action.

But later the governor, at a press conference at Wiley Post Airport, said a decision on a lawsuit would come after the election.

He added, however, "You have to prove you've been damaged to win a suit, and I don't believe anybody is foolish to believe such ridiculous allegations."

Meanwhile, at least four state newspapers and one radio station denounced Miskovsky's statement.

Calling it a "dirty attempt to smear Boren," the Oklahoma City Times said Miskovsky had reached a "new low" in state politics by his "gutter-type" letter to Boren.

It concluded, "But having raised the issue, Miskovsky perhaps should answer the same questions.

"So tell us, George, are you gay?"

During a Capitol press conference, Miskovsky said his answer to the four questions directed at Boren would be "no."

In an editorial for its Friday editions, the Tulsa World said the comments were "a voice from the sewer."

The World said Miskovsky won a place in state history saying he "took the prize for the filthiest stunt that has ever been pulled by a serious candidate for major public office in this state."

Oklahoma City radio station KTOK said the names of Miskovsky and Points should be striken from the election ballot.

"Such loathesome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points would lend to the U.S. Senate if they were elected."

The Shawnee News-Star editorialized in Friday editions that the charge that Boren is a homosexual "would be more at home on the walls of a saloon toilet."

"What was the basis for Miskovsky's question?" about Boren's sexual orientation, the News-Star asked. "Did he have any evidence? Any mystery witnesses? Any peephole photographs? Any torrid love letters or lurid diaries? Not at all.

"Cesspool allegations have no place in the political arena. We believe George Miskovsky has no place in it any longer either."

APPENDIX E

Oklahoma City Times Friday, August 11, 1978

BOREN'S FRIENDS EXPRESS DISGUST

SEMINOLE—Longtime friends and close associates of Gov. David Boren expressed shock and disgust in his hometown today after allegations surfaced Thursday that he is a homosexual.

"I'm extremely disappointed in that kind of tactic," the Rev. Bob Cocke, Boren's former pastor here, said today. "There's no truth in that I have any knowledge of.

"There's no doubt in my mind that this is a smear tactic," he said.

Kaulk said he has known Boren for nine years and that Boren was "very active" in the First Methodist Church here before he was elected governor in 1974.

"He served on our pastor-parish relations board for four years before he was elected governor," he said.

"I'm really shocked. I just can't believe it," he said of the allegations.

Lifelong friend Liz Robertson, co-owner of Adwan's Specialty Shop in Seminole, said she was shocked about the remarks.

"I think it is the dirtiest form of politics that can be done," she said "I've known him all of his life, and I can't imagine anyone would do that."

Ms. Robertson said she lived across the street from the Borens when they lived in Seminole and that her family has been friends with the Borens for years.

"We've spent many hours in his home and he in ours," Ms. Robertson said.

Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron, said he expected Miskovsky to be the "hatchet man" in the campaign.

"I've known David all his life and I don't think there's any basis to it," Lynn said.

APPENDIX F

The Daily Oklahoman Friday, August 11, 1978

MISKOVSKY AND MUD

George Miskovsky has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing.

In a press conference reported on elsewhere in The Oklahoman, the septuagenerian lawyer has attempted to inject some sign of vitality in his moribund campaign for the Democratic nomination for the U.S. Senate.

His tactic was to indirectly suggest, in the form of a letter asking questions, that Gov. David Boren has homosexual tendencies.

Were it not for the fact that American law and tradition make it virtually impossible to libel or slander a political figure, Miskovsky's words would be actionable. As it is, they are merely despicable and stupid.

The governor also is a candidate for the Democratic senatorial nomination, along with several others. In the judgment of most observers he is running ahead of his challengers at this stage of the compaign, with Miskovsky generally acknowledged as going nowhere.

So what does an aging ex-politician, hungry for the limelight again, do in a situation like this? More often than not, he goes to the old mudball.

Whether David Boren becomes a U.S. senator from Oklahoma is not the issue here. That is a judgment the people of Oklahoma are perfectly capable of making for themselves without any dirty-trick assistance from the likes of Miskovsky.

What the public should bear in mind, however, is the fact that David Boren's public career, as a state legislator and governor, is a matter of widely publicized record.

There are legitimate differences of opinion about that record, depending on your point of view. But few informed persons in our state would argue that Boren's public service has not been honorable or that his motivation and intentions have not been in the public interest.

It is on that record, and on the positions he takes on national issues during the campaign, that Boren's Senate candidacy should be weighed—and not on the scurrilous defamation hurled by Miskovsky.

Of the other candidates in the race, not even wily State Sen. Gene Stipe, the wheeler-dealer from Little Dixie, has stooped so low as Miskovsky has.

Miskovsky should save his gutter theatrics for the next time he is defending some scoundrel in criminal court. Any man who so covets political office is the kind Oklahoma doesn't need in the U.S. Senate or anywhere else in public life.

Meanwhile, let's get on with hearing what the truly viable candidates for the Senate have to say about why they should be elected.

APPENDIX G

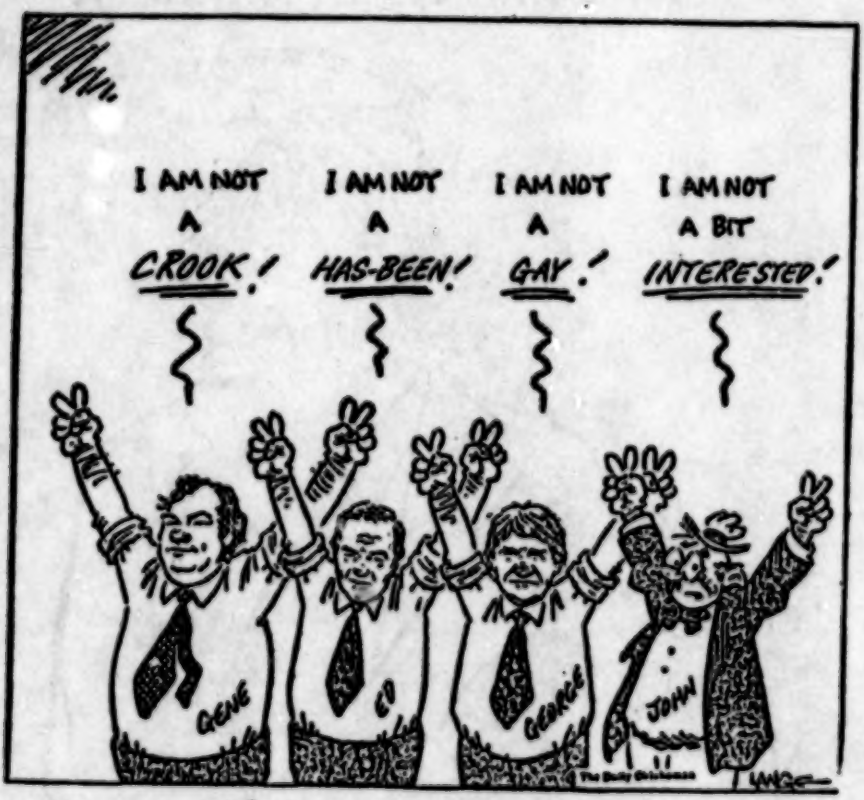
August 14, 1978 Oklahoma City Times

'Isn't that right, Anthony?'

APPENDIX H

August 16, 1978 — Daily Oklahoman

BOREN vs. BORIN



APPENDIX I

Oklahoma Statutes Tit. 12 § 1441

> Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

APPENDIX J

IN THE DISTRICT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

No. C 79-401 (T)

GEORGE MISKOVSKY,
Plaintiff,

vs.

THE OKLAHOMA PUBLISHING COMPANY,
Defendant.

Filed May 27, 1980

INSTRUCTIONS

No. 1

LADIES AND GENTLEMEN OF THE JURY: The Plaintiff in this case George Miskovsky, is suing Defendant, The Oklahoma Publishing Company for the sum of $10,000,000.00 actual damages and $15,000,000.00 punitive damages. Plaintiff alleges that while a candidate for the United States Senate, he attended a meeting at the Ponderosa Restaurant in Canadian County, Oklahoma. Plaintiff alleges that at this meeting Mr. Anthony Points, also a candidate for the United States Senate, read from a flyer which contained defamatory remarks concerning U.S. Senate candidate David Boren. Plaintiff alleges he was libeled by three news articles, one editorial and one editorial cartoon which were printed by the Defendant. Plaintiff alleges that as a result of the articles, editorial and cartoon, the public was left with the false impression that Plaintiff originated the charges of homosexualty against David Boren and that this impression imputed a crime to Plaintiff. Plaintiff alleges that he has suffered injury to his character and reputation, professional standing in the community, and loss of income as a result.

Defendant has answered the allegations of the plaintiff and contends that the publications complained of were not defamatory and even if they were, they were privileged and matters of opinions.

No. 2

Plaintiff contends that defendant through its writings and cartoons falsely depicted plaintiff of not only accusing U.S. Senate Candidate David Boren of being a homosexual, but also engaging in concert, confederation, or conspiracy with U.S. Senate Candidate Anthony Points to falsely accuse Candidate Boren of being a homosexual and these depictions imputed to him a crime.

In this regard you are instructed that Criminal Libel is a crime under the penal code of the State of Oklahoma and is defined as a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation.

You are further instructed that Criminal Conspiracy is a crime under the penal code of the State of Oklahoma and is defined as follows:

If two or more persons conspire either:

1. To commit any crime; or
2. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws, they are guilty of a misdemeanor.

No. 3

The Plaintiff's claim consists of seven essential elements, each of which the Plaintiff and the Plaintiff alone bears the burden of proving.

Under our law a person's good reputation is held in high regard. When that reputation is attacked by false assertions of fact, the law gives the individual the opportunity to bring a libel action to recover damages.

When the plaintiff is a candidate for public office, as was the plaintiff here, he is considered to be a "public figure," and he must bear heavy burdens in order to make out a claim for which he can recover damages. A person who has assumed a role of special prominence in the affairs of society, or a person who has thrust himself to the forefront of particular public controversies in order to influence the resolution of the issues involved. A candidate for public office is a public figure.

No. 4

The Plaintiff has the burden of proving these allegations. If the Plaintiff fails to prove his allegations in accordance with the principles contained in these instructions, your verdict must be for the Defendant.

Libel is a false and malicious, unprivileged publication of facts by writing concerning a person which exposes that person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation.

No. 5

In order to recover the burden is upon the Plaintiff to prove by the Plaintiff's claim seven essential elements:

First, that the Defendant published written statements as opposed to oral statements;

Second, that the written statements constituted libel;

Third, that the written statements are defamatory on their face, that is, without the necessity of showing any additional facts to establish the defamatory nature of the statements;

Fourth, that the written statements were "of and concerning the Plaintiff;"

Fifth, that the written statements were published to third persons;

Sixth, that the written statements were false in some material, particular respect; and

Seventh, that the written statements which were false were published with actual malice as that term will be defined for you later in these instructions.

The burden is on the Plaintiff to prove the first five of these elements by a preponderance of the evidence.

The Plaintiff's burden with respect to the sixth and seventh elements, that is, proving that the statements were false and that they were made with actual malice, is much higher. The Plaintiff has the burden of proving these two elements by clear and convincing evidence.

If you find that the Plaintiff has established these seven elements by the standards that will be explained to you, you may find for the Plaintiff. If, on the other hand, you find that the Plaintiff has failed to establish any of these elements under the appropriate standard, then it is your duty to find for the Defendant.

As has been stated, the burden of proof of each element is on the Plaintiff. The Defendant is not obliged to call any witnesses or introduce any evidence on its behalf if the Plaintiff has failed to prove any one of the elements I have just described to you.

No. 6

In this case the alleged libel is contained in three newspaper articles, one newspaper editorial and one editorial cartoon. Exhibits 5, 6, 7, and 8. It is these items alone

upon which the Plaintiff's allegation of libel depends and you may not consider any other charges which may have been made by the Plaintiff in the course of this trial in determining his claim.

Other exhibits or publications, not complained of in Plaintiff's Petition, which have been admitted in evidence are not the basis for Plaintiff's claims of libel which you are considering. These other Plaintiff's exhibits which were admitted were admitted in evidence for, among other things, to support Plaintiff's contention that they furnish proof of either actual or expressed malice toward the Plaintiff on the part of the Defendant.

No. 7

If you find that the allegedly libelous publications are mere statement of opinions based on facts either in the publication or known to the public, then you must find for the Defendant.

No. 8

Defendant relies on the defense of fair comment. In this regard, you are instructed that the defense of fair comment is lost through clear and convincing proof of wilful or reckless disregard for truth.

No. 9

You are instructed that the law of free speech and press grants to the Defendant, in this case, a privilege to publish true, and accurate reports.

However, the freedom granted by law to the Defendant does not extend to false unprivileged statements or statements made with reckless disregard of whether they are false or not if such statements, which expose the Plaintiff to public hatred, contempt, ridicule or obloquy, or which tend to deprive him of public confidence or injure him in his profession or occupation.

No. 10

You are instructed that a republisher of a libel, such as the Plaintiff concerning Anthony Points' allegations, has the same culpability for libel as the one making the original statement. You must consider the rule concerning republication in deciding whether the Plaintiff has met his burden of proof that the Defendant's statements about him were false.

No. 11

You will recall that I instructed you that in order for a statement to be found libelous not only must it among other things be false and malicious, but also unprivileged. In this state a publisher may criticize the acts of a candidate for public office such as the Plaintiff was without fear of committing a libel unless the plaintiff was accused of committing a crime. Therefore, unless you find that the Plaintiff has proven by a preponderance of the evidence that the publication accused him of a crime, your verdict must be for the Defendant.

Even if you should find that the Plaintiff has proven that the publication accused him of a crime, you must find for the Defendant unless the Plaintiff has also proven the seven elements of his case as I have previously defined them for you.

No. 12

Libel is "a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloguy, or which tends to deprive him of public confidence, or to injure him in his occupation . . ."

No. 13

Everyone has the right to comment and express their opinion, especially on matters of public importance. Mis-

statements of fact in expressions of opinion are protected unless they are made with malice as defined in these instructions for the purpose of damaging another's reputation. Expressions or statements of opinion cannot be held to be libelous. This is true even though those expressions of opinion may be harsh, vituperative, and embarrassing to the Plaintiff.

No. 14

As a public figure, plaintiff has the burden of proving to you that the publications complained of were published with what is known in the law as malice.

In order to prove that he has been libeled by the defendant, plaintiff must prove the publications were knowingly false or were published with reckless disregard of whether they were true or not. Proof of malice requires evidence showing that the defendant published the material complained of with an awareness of the probable falsity of the publications or that there be sufficient evidence to permit the conclusion that the defendant, through its agents, published the alleged defamatory writings and cartoons with reckless disregard of the truth of the publications in order for the plaintiff to be entitled to recover damages from the defendant.

No. 15

Knowingly means possession of knowledge or information. It means an awareness of a material fact.

Knowingly simply means that a person is aware of the existence of the facts in question and that he has acted in consideration of such facts and produced the specific result.

No. 16

You are further instructed that you may find actual malice to exist if you find the material complained of to be false and that:

1. The false material was fabricated by the defendant or
2. The false material was the product of defendant's agent or agents' imaginations; or
3. The cartoons and writings published are so inherently improbable that only a reckless man would have put it in circulation; or
4. That the writings and cartoons complained of were knowingly false, or were published with reckless disregard of their falsity.

No. 17

If you find in favor of plaintiff you may then assess his actual compensatory damages. In this regard, you may take into consideration any loss in profits or income suffered by the plaintiff in his profession or business, as a direct and proximate result of libel and in addition, you may award the plaintiff such sum, as in your discretion the evidence dictates, that will compensate him for the impairment of his reputation and standing in the community, personal humiliation, mental anguish and suffering not to exceed the sum of $10,000,000.

No. 18

There are two types of damages, which you may award should you find for the plaintiff on the issue of libel.

The first type of damages is referred to as "Compensatory damages." These are damages awarded to compensate plaintiff for damage which you may find for the plaintiff if you find and believe plaintiff has proved he has suffered for the libel. Such damages must be shown as proximately caused by the libel.

One of the elements of compensatory damages for a libel claim is mental suffering of the plaintiff caused by the publication. Other elements are for exposing plaintiff

to public hatred, contempt, ridicule or obloquy, or which tend to deprive plaintiff of public confidence, or injury him in his profession or occupation.

A second element of compensatory damage may be damage and injury to character and reputation.

Should you find that plaintiff has established by clear and convincing evidence that the defendant acted with malice, as defined herein, then you may consider whether you wish, in your sole discretion, to award the second type of damages, which is referred to as exemplary or punitive damages.

Exemplary damages mean damages by way of example or punishment, and are not necessarily to be measured by the extent of the damage and injury. Exemplary damages are given as monetary punishment to make an example, not for the benefit of the plaintiff, but for the public good and for the purpose of preventing others from a repetition of like or similar conduct as to another person or persons similarly situated. A party asking for exemplary damages has only an incidental personal interest. His recovery is whole and complete with actual damages. Exemplary damages, is a tool to deter the wrongdoer, and is for society's benefit and not the plaintiff's. Exemplary or punitive damages may be awarded on the libel claim, only if you have awarded plaintiff actual or compensatory damages. Exemplary or punitive damages, if you in your discretion award them, are to be assessed in accordance with what would be an appropriate example and financial punishment to the defendant in question, in light of defendant's financial ability to pay and in light of the gravity of the libel complained of and in consideration of all the facts and circumstances. Thus, for the same wrong, you would not award substantial exemplary or punitive damages against a defendant of limited means, to the same extent you would against a defendant with greater financial capacity.

In no instance shall your award of exemplary damages exceed $15,000,000.00.

No. 19

A proximate cause is an act which, in a natural and continuous sequence produces the damage and without which the result would not have occurred.

No. 20

You are instructed that the burden is upon the plaintiff to prove his claim.

The defendant has no burden to prove anything. You must not base your decision on the trial tactics of the parties, the decision of the lawyers to rest their cases at the time they did, or any perceived actions of the parties after you render a decision.

IN CLOSING

This case is now submitted to you for your decision and verdict.

When you have arrived in the jury room you should first choose one of the jury as a foreman and then begin deciding the case. You must not use any method of chance in arriving at your verdict, but rest it on the opinion of each juror who agreees with it. The form of all possible verdicts will be sent to the jury room with you, along with these written instructions of the Court. If all twelve (12) of you agree on a verdict, select the one (1) correct form of verdict and only your foreman alone need sign it; if you do not all agree, but at least nine (9) or more of you do, then only those nine (9) or more agreeing will each, individually, sign the verdict form. Notify the Bailiff when you have arrived at a verdict so that you may return it in open court.

The jury is now placed in charge of the Bailiff and will be taken to the jury room.

GIVEN this 21st day of May, 1980 at

/s/ Preston Trimble
PRESTON TRIMBLE
District Judge

Office - Supreme Court, U.S.
FILED
AUG 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE MISKOVSKY,

Petitioner,

v.

THE OKLAHOMA PUBLISHING COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

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BRIEF IN OPPOSITION OF RESPONDENT THE OKLAHOMA PUBLISHING COMPANY

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August 12, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Was the Supreme Court of Oklahoma correct in determining that the Petitioner failed to present sufficient evidence of defamation, falsity and actual malice to submit his case to the jury? *

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* Pursuant to Rule 28.1 the Respondent states that The Oklahoma Publishing Company is a privately-owned company. It has no parent company or affiliates and its only non-wholly owned subsidiary is The Farmer Stockman Publishing Co.

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Fawcett Publications, Inc. v. Morris, 377 P.2d 42 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964) .. 8
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2407

GEORGE MISKOVSKY,

Petitioner,

v.

THE OKLAHOMA PUBLISHING COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

BRIEF IN OPPOSITION OF RESPONDENT THE OKLAHOMA PUBLISHING COMPANY

Respondent The Oklahoma Publishing Company respectfully submits that a writ of certiorari should not issue to review the opinion and judgment of the Supreme Court of the State of Oklahoma entered on January 12, 1982.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court has been officially reported at 53 Oklahoma Bar Journal 76, and appears in the Petitioner's Appendix at 1a [hereinafter Pet. App.]. The order of the Oklahoma Supreme Court denying Petitioner's motion for rehearing appears at Pet. App. 19a.

JURISDICTION

Except as discussed in Arguments I and II, *infra*, Respondent is satisfied with Petitioner's jurisdictional statement.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Aside from the Constitutional provisions set forth in the Petition for Certiorari, this case involves Okla. Stat. Ann. tit. 12, § 1443, which is set forth in an Appendix to this Brief.[1]

STATEMENT OF THE CASE

With few exceptions, the errors that Respondent perceives in the Petitioner's statement of the case are not material to the question before the Court. Therefore, no elaborate discussion of the facts is necessary here. A few points, however, require clarification.

The primary for the Democratic nomination for United States Senator from Oklahoma took place on August 22, 1978. On August 10, 1978, less than two weeks before that primary, the Petitioner, one of several candidates for that office, called a news conference at which time he distributed his letter to then Oklahoma Governor, and now United States Senator, David Boren.

In the letter, after a lengthy recitation of allegations which even the Petitioner testified did not support any

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[1] This statute, which was in effect at the time of the publications at issue here, was repealed by 1980 Okla. Sess. Laws Ch. 68, § 1 effective April 10, 1980, because it had been held unconstitutional in a part not pertinent here in *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 90 (Okla. 1976). Subsequently, the relevant portion was re-enacted as Okla. Stat. Ann. tit. 12, § 1443.1 (West 1982), effective April 7, 1981.

charge of homosexuality against Boren (R. 486 (84)),[2] the Petitioner's letter asked the following questions:

> Do you know what a homosexual or bisexual is?
>
> Are you a homosexual or bisexual?
>
> Have you ever been a homosexual or bisexual?
>
> Have you ever engaged in homosexual or bisexual activity? (R. 489, Pl. Ex. 3A, Pet. App. 4a).

Petitioner concluded his letter with the following statement:

> The people are entitled to an immediate response. Such response should be subscribed by you under oath. (R. 489, Pl. Ex. 3A, Pet. App. 5a).

The text of the letter is set forth in full in the opinion of the Oklahoma Supreme Court. (Pet. App. 3a-5a).

Petitioner made the concluding statement in the letter even though he did not believe the rumors that Boren was a homosexual (R. 486 (75, 79); R. 487 (205)), and even though he had no reason to believe the flier or statement of Points. (R. 486 (75); R. 487 (218, 222-23)). Petitioner and his press secretary were both severely displeased and disturbed by the sparse press coverage which Petitioner's campaign had received up to the point of this news conference. (R. 487 (202)).

The opinion of the Oklahoma Supreme Court aptly describes the events surrounding the press conference itself, and the publication of the allegedly libelous matters:

> The letter was delivered to the Governor's office approximately ten minutes prior to a press conference held by Mr. Miskovsky. At the press conference, Mr.

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[2] References are to the Record before the Oklahoma Supreme Court. Each of the three days of trial testimony was given its own record number designation (e.g., 486) and is paginated separately from every other day. Thus, the reference in the text is to page 84 of the transcript of the first day of testimony, which is record document 486.

Miskovsky told members of the press and the media of Mr. Points' statement and of his letter to the Governor.

In preparation for the press conference, Mr. Miskovsky's press agent personally called various members of the media, telling them that this was going to be a "hot" press conference that would be worthy of their attention.

Governor Boren, who was out on the campaign trail, and away from the Capitol, upon hearing of Miskovsky's press conference, flew back to Oklahoma City and held a make-shift press conference at Wiley Post Airport, categorically denying the charges against him.

The next day, August 11, 1978, the Oklahoma Publishing Company (OPUBCO), publisher of *The Daily Oklahoman*, a morning paper, and *The Oklahoma City Times*, an evening paper, published three news articles and an editorial dealing with Mr. Points' charges, Mr. Miskovsky's press conference, and the Governor's response to these events. A few days later, OPUBCO also published an editorial cartoon lampooning Miskovsky's actions. These five publications—three news articles, an editorial, and an editorial cartoon—are the publications which Mr. Miskovsky claims libeled him. Pet. App. 5a.

Petitioner filed suit initially in Oklahoma County District Court on August 16, 1978, six days before the primary. He immediately noticed the depositions of several of his opponents, including Governor Boren, for the Saturday before the Tuesday, August 22, primary. Eventually Petitioner voluntarily dismissed this action while it was pending on the Respondent's motion for summary judgment and refiled his case the next day in the adjacent county, where it proceeded to judgment. The sequence of these events is described more fully by the Oklahoma Supreme Court in *The Oklahoma Publishing Company v. Miskovsky*, 7 BNA Media L. Rptr. 2613 (Okla. 1982), 53 Okla. Bar Journal No. 2 p. 62 (Jan. 12, 1982).

ARGUMENT

I. PETITIONER'S FAILURE TO RAISE THE CONSTITUTIONAL ISSUE PRESENTED IN QUESTION 1 BEFORE THE OKLAHOMA SUPREME COURT DEPRIVES THIS COURT OF JURISDICTION.

For a party to obtain review in this Court of a state court decision on grounds that it offends the Federal Constitution, it is essential that the constitutional claim have been presented to and decided by the highest state court. *Webb v. Webb*, 451 U.S. 493, 495 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Bailey v. Anderson*, 362 U.S. 203 (1945); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 (1977). Unless the record shows that the federal question was raised and decided in the state court, this Court lacks jurisdiction. *Cardinale*, 394 U.S. at 438.

Moreover, when the state court has failed to rule on the federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

Petitioner's first Argument is that the Oklahoma Supreme Court "incorrectly held" that he must prove that the defamatory statement was false in order to meet his burden of proof under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). (Pet. 14). Petitioner repeats this theme throughout his first Argument. (Pet. 15, 16-17).[3]

There is no question here that the Petitioner did not—and could not—raise the issue of the burden of proof of falsity before the Oklahoma Supreme Court. The reason

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[3] Petitioner's argument that the Oklahoma Supreme Court misapplied the law with respect to the defamatory meaning of a statement is simply wrong as a matter of Oklahoma Law. See Argument II, *infra*.

is that he not only did not object to the jury instruction which placed that burden on him (Pet. App. 35a), but also he specifically endorsed the instructions as correct.[4]

Before the jury instructions were read, Petitioner's counsel interjected as follows:

> Just a minute.
>
> Your Honor, Plaintiff does not object to any Instructions given, for the record. (R. 488 (187)).

After the instructions were read, counsel for the Petitioner again stated his lack of objection:

> Plaintiff states, for the record, that . . . we believe that the Court did fairly instruct the Jury as to the substance of all the requested instructions, and, for that reason, we have no objection to any of the Instructions as amended. (R. 488 (232)).

Under Oklahoma law, the failure to object to jury instructions constitutes a waiver on appeal of any issues concerning them. *Hames v. Anderson*, 571 P.2d 831, 833 (Okla. 1977).

Moreover, Petitioner repeated his agreement with the instructions in his brief before the Oklahoma Supreme Court:

> A. *The jury in this case was correctly instructed.*
>
> • • • •
>
> It is respectfully contended that a review of the instructions will reveal no fundamental error. (Pet. Br. Okla. Sup. Ct. 29, 31).

The constitutional issue which the Petitioner attempts to raise, therefore, was first raised in this Court.[5] Under

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[4] In addition, the question was clearly decided correctly by both the trial court and the Oklahoma Supreme Court.

[5] As any discussion of the facts of the case well demonstrates, even that supposed constitutional issue is not an important federal question that needs to be decided by this Court, regardless of whether or not it was decided below.

this Court's established precedents, Petitioner's failure to make its constitutional argument below deprives this Court of jurisdiction and the Petition for Writ of Certiorari must be denied.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

It is a second fundamental premise of this Court's jurisdiction that it will not review a state court judgment based upon an adequate and independent state ground, even if a federal question is involved and is perhaps wrongly decided.* *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). Ordinarily it is presumed that a decision is based upon a non-federal ground in the record which may be adequate to support it. Jurisdiction will be declined unless there is an affirmative showing that a federal question was presented to the state court and that a decision on the issue was necessary to the state court's determination. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934); *Adams v. Russell*, 229 U.S. 353, 358 (1913). The burden is on the Petitioner to show that the state ground cannot account for the decision below. *Durley v. Mayo*, 351 U.S. 277, 281 (1956). That burden is not met if it appears that the judgment below might have rested on a non-federal ground. *Id.*; *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *Ellis v. Dixon*, 349 U.S. 458, 459 (1955).

In the instant case, the jury was properly instructed as the Petitioner concedes (Pet. 11; p. 6, *supra*), that it could not return a verdict for the plaintiff unless it found that the Respondent had "accused [the plaintiff] of committing a crime." (Pet. App. 37a, Instruction No. 11). This is because under the Oklahoma statute in

* Of course, the Respondent does not believe or concede that any federal question was wrongly decided below.

effect at the time, in the words of the jury instruction, "[i]n this state a publisher may criticize the acts of a candidate for public office such as the Plaintiff without fear of committing a libel unless the plaintiff was accused of committing a crime." (*Id.*).

The privilege referred to by the trial court was found at Okla. Stat. Ann. tit. 12, § 1443, set forth in the Appendix. That privilege is absolute. *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964); *Thompson v. Newspaper Printing Co.*, 325 P.2d 945, 947 (Okla. 1958). It makes no difference that the criticisms were justified, had any merit, were false or were made with malice. *Pacific Employers Ins. Co. v. Adams*, 196 Okla. 597, 168 P.2d 105, 107 (1946). The only exception to this privilege is the false imputation of a crime.

The Oklahoma Supreme Court, in discussing the editorial which was claimed to be libelous, found as follows:

> In so holding, we note that no evidence at the trial was introduced to show that any reader interpreted the statement to have imputed the commission of criminal libel on Mr. Miskovsky's part. (Pet. App. 15a).[7]

Proof of the imputation of a crime was a necessary part of the Petitioner's case under state law and no evidence was introduced to support such a finding. Because the decision below thus rests on an adequate and independent state ground, this Court lacks jurisdiction to review it.

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[7] Even if an imputation of criminal libel had been made, Oklahoma's criminal libel statute is clearly unconstitutional. *Garrison v. Louisiana*, 379 U.S. 64, 70 n. 7 (1964). This point was argued extensively below by the parties, but was not reached by the Oklahoma Supreme Court, given its disposition of other issues.

III. THE REMAINING ISSUES SOUGHT TO BE RAISED BY THE PETITIONER WERE PROPERLY DECIDED BELOW.

A. The Oklahoma Supreme Court Applied The Proper Standard of Review.

Petitioner criticizes the Oklahoma Supreme Court for failing to "cite a single Oklahoma case" concerning the proper standard of review. Both parties below cited and relied upon *Hodges v. Oklahoma Journal Publishing Co.*, 617 P.2d 191, 194 (Okla. 1980) as stating the standard of review. As the Petitioner stated in its brief to the Oklahoma Supreme Court, "that case [*Hodges*] correctly describes this Court's role." (Pet. Br. Okla. Sup. Ct. 29).

Hodges itself held that it was the Oklahoma Supreme Court's duty "to consider the law and to make an independent evaluation of the record to insure the constitutional protection of the First Amendment." 617 P.2d at 194.

B. The Oklahoma Supreme Court Properly Determined That the Three News Stories And The Editorial Were Not Libelous.

Petitioner argues on several occasions that it was error for the Oklahoma Supreme Court to examine the record to determine whether the Petitioner had shown the publication of a defamatory statement. (Pet. 13, 14, 18-19 n. 15, 23 n. 20, 25). It is clear, however, that Oklahoma law required the Court to do exactly that:

> No one seems to dispute the well established law, both generally and in Oklahoma, that in libel and slander actions the trial court must first determine whether a publication is libelous per se. If it is not libelous per se, the court has the further duty to determine as a matter of law whether the writing is susceptible of a defamatory meaning derivable from extrinsic facts and circumstances which must be spe-

> cifically pleaded and supported by proof of special damages, i.e. libelous per quod. *M. F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167, 169 (10th Cir. 1968), and cases cited at 170.

And it is clear that the Oklahoma Supreme Court was obligated to follow the same standard on review. *See, e.g., Winters v. Morgan*, 576 P.2d 1152, 1154 (Okla. 1978); *Kee v. Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919).

Here the Oklahoma Supreme Court examined the three news stories and one editorial which were claimed to be libelous and found that none of them defamed the Petitioner or were false. (Pet. App. 9a-15a). Petitioner does not point to any statement which was false or defamatory. Instead, his primary argument is that the use of the word "raised" was a statement "accusing Miskovsky of actually making the allegations" concerning homosexuality. (Pet. 24). The words of the Court below adequately dispose of this argument:

> To say that Mr. Miskovsky did not increase the intensity of the allegations made by Mr. Points would be sheer nonsense.
>
> • • • •
>
> To hold that Mr. Miskovsky's actions could not be taken as implications of homosexuality would be a denial of the obvious. (Pet. App. 12a).

Petitioner himself testified at trial that he had no proof that any statement in any of the three news stories was false. (R. 486 (132)).

With respect to the editorial, Petitioner argues that it was not a statement of opinion because it accused him of criminal libel. Leaving aside the fact that it is an editorial which is being discussed, as has been shown previously at p. 8, *supra*, the Oklahoma Supreme Court found there was no evidence introduced showing that anyone did or even could have considered the editorial as

accusing the Petitioner of criminal libel. (Pet. App. 15a). Moreover, such an inference would have defied common sense. *See, e.g., Gibson v. Kincaid*, 221 N.E. 2d 834, 837 (Ind. App. 1966).

Finally, although the Petitioner's question presented is whether there was "sufficient evidence of undisclosed defamatory facts" in the news articles and the editorial, he never once sets forth how these publications implied the existence of undisclosed facts.

C. Petitioner's Argument With Respect to the Cartoon Has no Legal or Factual Support.

Petitioner's second argument is that the Oklahoma Supreme Court should have deferred to the jury's supposed conclusion as to the Respondent's state of mind. (Pet. 18). This argument ignores what the Petitioner himself recognizes earlier:

> It is now well settled that the finding of actual malice is a "constitutional fact" subject to *de novo* review by this Court. (Pet. 13).

The Respondent's state of mind is identical to the issue of actual malice—was the publication made with knowledge of falsity or with a subjective awareness of probable falsity of its content. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974). Thus not only are the Petitioner's arguments inconsistent on their face, but also their acceptance would require overruling what even the Petitioner recognizes as "well settled" principles.

Petitioner's factual argument with respect to the editorial cartoon which was published within one week of the end of a hotly contested primary campaign is that it was not hot news and that its "charges" should have been investigated. (Pet. 22). The Oklahoma Supreme Court gave the Petitioner the benefit of every doubt and assumed, without deciding, that the editorial cartoon was a defamatory statement of fact that had the strained mean-

ing which the Petitioner attached to it. (Pet. App. 15a-16a, 17a). But the Court concluded that

> there simply was no evidence introduced to show that the paper intended to use false statements, or that the paper had any serious doubts as to the statements they published.
>
> Lastly . . . there was no evidence that OPUBCO, at the time of publication, knew the meaning was false. (Pet. App. 17a).

The Petitioner points to no evidence which supports any contrary conclusion.[8] Because the Oklahoma Supreme Court properly applied the principles laid down by this Court in many earlier cases, *e.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), review of its decision should not be granted.

D. The Petitioner's Fourth Ground For Review Is Frivolous On Its Face.

This case concerns five publications made immediately before a primary election for United States Senate. As a case dealing with an election, it lies at the core of First Amendment protections.

In *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971), this Court held:

> Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule.

---

[8] Petitioner's reference to the alleged testimony of Mr. Lee (Pet. 21), is disingenuous. First, Mr. Lee had nothing to do with the publication of the cartoon. He saw it for the first time only after it was published. (R. 487 (35)). Second, the trial court sustained objections to this line of questioning, holding it immaterial and stating to Petitioner's counsel that he hadn't "established anything. You are reading from a Deposition without establishing some kind of reason for it." (R. 487 (37)).

Similar expressions of the core meaning of the First Amendment are found in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978), and *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), this Court advised extreme caution when dealing with defamation actions growing out of a campaign:

> The application of the traditional concepts of tort law to the conduct of a political campaign is bound to raise dangers for freedom of speech and of the press. . . . *A community that imposed legal liability on all statements in a political campaign deemed "unreasonable" by a jury would have abandoned the First Amendment as we know it.* 401 U.S. at 275 (emphasis added).

In the Petitioner's fourth Argument, he asks this Court to abandon the First Amendment in an election campaign by allowing a jury to find that the Respondent's criticism of him was unreasonable without regard to whether it was defamatory or published with *New York Times* malice. (Pet. 27, 28). Yet "[f]reedom of the press surely includes the freedom to call to readers' attention the activities of politicians, even in terms that invite suspicion, and even though those suspicions may prove groundless." Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 Tex.L.Rev. 271, 279 (1976).[9] Because Petitioner's request is basically that this Court rule that First Amendment principles be abandoned in election campaigns, when they are most vital, the Petition should be denied.

---

[9] Curiously, the author of this article appears as "Of Counsel" on the Petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Okla. Stat. Ann. tit. 12, § 1443 (as in effect August 1978):

> A privileged publication or communication is one made:
>
> . . . .
>
> Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.
>
> . . . No publication which, under this section, would be privileged shall be punishable as libel.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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---

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

This Court should grant review because the decision of the Oklahoma Supreme Court raises significant and heretofore undecided constitutional questions affecting media defendants, candidates for public office, and rights of voters to exercise fully and fairly their right of suffrage. As we show, the reasons which OPUBCO advances for opposing the writ are groundless.

I. THIS COURT HAS JURISDICTION OVER MISKOVSKY'S FIRST QUESTION.

Under 28 U.S.C. § 1257, this Court has jurisdiction by writ of *certiorari* "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States." Here, respondent OPUBCO appealed to the Oklahoma Supreme Court on constitutional grounds arguing, *inter alia*, that there was insufficient evidence of falsity and of constitutional ac-

tual malice under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The Oklahoma Supreme Court accepted OPUBCO's arguments, ruled in favor of OPUBCO on constitutional grounds, and declined to even discuss the alternate state grounds advanced by OPUBCO in its Brief. For this Court to have jurisdiction over this case, the constitutional claim must have been presented to and decided by the highest state court. *Webb* v. *Webb*, 451 U.S. 493, 495-496 (1981). Because both parties briefed the constitutional issues before the Oklahoma Supreme Court and because the Oklahoma Supreme Court ruled in favor of OPUBCO on constitutional grounds, OPUBCO may not claim that these issues were not presented to and decided by the highest state court.

A. Respondent Misstates Petitioner's First Question.

Respondent argues that this Court lacks jurisdiction because Miskovsky failed to object to Jury Instruction #5. Respondent's Brief misstates the question and misreads the jury instructions. It is clear from the decision of the Oklahoma Supreme Court that in its *de novo* review the court required Miskovsky to show "with convincing clarity" defamation, falsity and actual malice. Petition at 7a, 9a. It is equally clear that the trial court, on the other hand, only required Miskovsky to prove libel and defamation by a "preponderance of the evidence."[1] Jury instruction #5, Petition at 34a-35a. The state supreme court incorrectly believed that Oklahoma law on the issues of defamation and falsehood had been superseded by and controlled by requirements of the Federal Constitution. Accordingly, the Oklahoma Supreme Court erroneously en-

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[1] "Libel is 'a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation . . .'" Jury Instruction #12, Petition at 37a.

Miskovsky claimed that OPUBCO falsely accused him of criminal libel, criminal conspiracy, and unlawfully injured his personal and professional reputation and candidacy for public office.

gaged in *de novo* review of all of the evidence on the issues of defamation and falsehood.

Both parties agree that a finding of actual malice is a constitutional fact subject to *de novo* review by an appellate court. Petition at 13 and cases cited. However, petitioner contends that *de novo* review of defamatory meaning and falsehood under a standard of "convincing clarity" is not required by the Constitution or by this Court's holding in *New York Times*. A fair reading of the Oklahoma Supreme Court's opinion compels the conclusion that this is exactly what the state court did. OPUBCO implicitly recognizes the intellectual validity of the framework of petitioner's first question, but chooses to completely ignore Miskovsky's argument regarding libel and defamatory meaning by focusing *solely* on the alleged failure of Miskovsky to object to the jury instructions on the burden of proof.

Two different errors relating to libel and defamatory meaning resulted from the Oklahoma Supreme Court's erroneous belief that the entire Oklahoma law of defamation had been constitutionalized by *New York Times* and its progeny. Petitioner contends that a fair reading of the state court's decision demonstrates that the Oklahoma Supreme Court imposed on Miskovsky the burden of proving defamatory meaning "with convincing clarity." Petition at 7a and 9a. This was a much higher burden of proof than that required by the trial court, which stated that Miskovsky was required to prove libel and defamatory meaning "by a preponderance of the evidence." Jury Instruction #5, Petition at 35a. In addition to imposing this excessive burden of proof on Miskovsky, the Oklahoma Supreme Court engaged in a *de novo* review of the evidence of defamatory meaning, a sweeping review contrary to the Oklahoma law of defamation. *Wat Henry Pontiac* v. *Pitcock*, 301 P.2d 203, 207 (Okla. 1956); *Akins* v. *Altus Newspaper, Inc.*, 609 P.2d 1263, 1266-1267 (Okla. 1980), *cert. denied*, 449 U.S. 1010 (1980); Petition at 12-13 n.6.

B. Miskovsky May Properly Raise The Issue Of The Burden Of Proving Falsity Under The Constitution.

After the decision of the Oklahoma Supreme Court, Miskovsky petitioned for rehearing. Miskovsky raised eight different constitutional arguments, including the contention that the state court decision erroneously assigned to him the burden of proving falsity by clear and convincing evidence. Jury Instruction #5, Petition at 35a. Brief in Support of Petition for Rehearing at 11. Miskovsky was entitled to raise this issue under Oklahoma law because his failure to object to the jury instructions on this issue was not a waiver of his right to appeal any issues concerning the burden of proof on falsity. Under Oklahoma law, objection to jury instructions is waived only "*absent fundamental error.*" *Hames* v. *Anderson*, 571 P.2d 831, 833 n.2 (Okla. 1977) (emphasis supplied); *Wat Henry Pontiac*, 301 P.2d at 207. However, the decision of the state court in allocating so heavy a burden of proving falsity to Miskovsky was fundamental error where OPUBCO failed to present any evidence whatsoever.[2] As soon as the significance of this fundamental error became apparent, Miskovsky sought a rehearing. Thus, this issue is preserved for appeal under Oklahoma state law.

Although the general rule is that after judgment the attempt to raise a federal question by a petition for rehearing comes too late, this principle is subject to an exception. *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935). "[I]f the ruling of the state court could not have been anticipated and a petition for rehearing presents the first

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[2] By the time of the Oklahoma Supreme Court's decision on January 12, 1982, this Court had granted the petition for *certiorari* in *Wilson* v. *Scripps Howard-Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 102 S.Ct. 500 (1981), *cert. dismissed per stipulation*, 102 S.Ct. 984 (1981). Since one of the issues in *Wilson* was whether the trial court improperly assigned to the plaintiff the burden of proving falsity in a private figure case, the granting of the writ of *certiorari* emphasized the nature of the error in the jury instruction.

opportunity for raising it," then the federal question may properly be raised before this Court. *Id.* at 444. Miskovsky had no real opportunity to raise the issue of the burden of proving falsity in his Brief because he won at trial after OPUBCO declined to present a case at trial and Miskovsky was satisfied with the jury's verdict.

Moreover, even if Miskovsky may not object to the instruction of the trial court assigning to him a constitutional standard of proving falsity by "clear and convincing evidence," there is still clear constitutional error in the opinion of the Oklahoma Supreme Court. The appellate court engaged in a *de novo* review of the evidence presented at trial in reaching its decision that Miskovsky had not proved falsity by "clear and convincing evidence" under the erroneous belief that it was required to do so under *New York Times*. Had the Oklahoma Supreme Court not done so, it would have deferred to the jury's verdict under well-established Oklahoma legal principles which limit the scope of review of factual findings of a jury. *Wat Henry Pontiac*, 801 P.2d at 207; *Akins*, 609 P.2d at 1266-1267.

C. The Question Of Whether A Public Figure Libel Plaintiff Must Bear The Burden Of Proving Falsity By Clear And Convincing Evidence Is An Important Constitutional Question Which Needs To Be Decided.

OPUBCO argues that the burden of proof on the issue of falsity "is not an important federal question that needs to be decided by this Court." Opposition at 6 n.5. The question of who must carry what burden of proof on the question of falsity has been the subject of learned law review articles and opinions of many federal courts of appeal and state appellate courts. Petition at 16-17 n.12, 13. Placing on plaintiff the burden of proving with "convincing clarity" the falsity of a libelous statement effectively emasculates the law of libel and prevents public figures from protecting their reputations or vindicating

their First Amendment rights. Understandably, OPUBCO may not wish to have this Court decide this issue; however, this does not in any way detract from the importance of the question.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS NOT BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court has jurisdiction where the decision of the federal constitutional question was necessary for the determination of the case and where the federal question was actually decided. The Oklahoma Supreme Court did not base its decision on independent state grounds and the judgment rendered could not have been given without deciding the constitutional question. *Southwestern Bell Tel. Co.* v. *State of Oklahoma*, 303 U.S. 206, 212-213 (1938). Where the non-federal grounds for the decision were not considered by the state court, this Court has jurisdiction. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925). It is irrelevant to the Supreme Court's jurisdiction that the decision below could have been based on adequate and independent state grounds. *Orr* v. *Orr*, 440 U.S. 268, 274, 277 (1979). The mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not divest this court of jurisdiction. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-631 (1973).

Initially, it may be noted that if the Oklahoma Supreme Court intended to base its decision on grounds of state law, it certainly would have said so.[8] Petitioner contends that a fair reading of the state court's opinion leaves no doubt that the court was interpreting *New York Times* and its progeny in the belief that these cases supplanted the Oklahoma law of libel.

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[8] The Oklahoma Supreme Court stated that "[t]he dispositive issue in this cause is whether the evidence . . . was sufficient to permit the submission of the cause to a jury." Petition at 1a.

Respondent argues that the publication of the three newspaper articles, the editorial and the cartoon was privileged and cites Okla. Stat. Ann. tit. 12 § 1443 as the adequate and independent state grounds for the Oklahoma Supreme Court's decision. This statute was not quoted in the state court's opinion (even though the issue was briefed). The wording of the statute refers to "public officers" and on its face this provision does not extend a privilege to protect criticism of Miskovsky who is a public figure, but not a public official.

Furthermore, the trial court instructed the jury that OPUBCO could not claim privilege under state law if Miskovsky proved by a preponderance of the evidence that the publications accused him of committing criminal libel or engaging in criminal conspiracy. Jury Instruction #11, Petition at 37a; *Thompson* v. *Newspaper Printing Corp.*, 325 P.2d 945, 947 (Okla. 1958); *Winters* v. *Morgan*, 576 P.2d 1152, 1156 (Okla. 1978); *Wright* v. *Haas*, 586 P.2d 1093, 1097 (Okla. 1978). Clearly, the opinion of the Oklahoma Supreme Court does not purport to find the jury instruction or the jury findings on the issue of privilege erroneous under state law. Under settled principles of Oklahoma law which require deference to the findings of a jury, the state court would not have overturned such findings of fact by the jury. *See Wat Henry Pontiac* v. *Pitcock*, 301 P.2d at 207. Petition at 12-13 n.6.

III. RESPONDENT CONFUSES *DE NOVO* REVIEW OF A FINDING OF ACTUAL MALICE WITH SUBSTITUTION OF JUDGMENT.

Although state appellate courts (and this Court as well) have the duty of *de novo* review of a jury's finding of actual malice, an appellate court should not freely substitute its judgment for that of the jury. Miskovsky's right to a jury trial is not to be subordinated to the First Amendment rights of a multi-media conglomerate. None of the rights articulated in the Bill of Rights have pri-

ority over the others. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 561 (1976).

Further, the duty of *de novo* review of a finding of actual malice is consistent with Chief Justice Burger's admonition in *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979), that the issue of actual malice does not lend itself to "summary disposition" and should be decided by a jury. *De novo* review of a finding of actual malice should be limited to a determination of whether there is sufficient evidence for a jury to conclude that the plaintiff proved the existence of actual malice by clear and convincing evidence. Where there is reasonable support in the record for a finding of actual constitutional malice, a reviewing court should defer to the findings of the jury. *Time, Inc.* v. *Hill*, 385 U.S. 374, 394 n.11 (1966).[4]

Miskovsky's petition argues that the Oklahoma Supreme Court made several legal errors in its analysis of the evidence as to whether OPUBCO acted in reckless disregard of the truth. *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); Petition at 18-22. Accordingly, this Court should review the state court opinion to correct that error.

OPUBCO refers to the "strained meaning" given to the cartoon by Miskovsky. Opposition at 11. The jury sitting in Cleveland County, Oklahoma, certainly did not believe that the meaning ascribed to this cartoon by Miskovsky was "strained." OPUBCO's characterization of the cartoon goes right to the heart of one of the issues addressed

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[4] Respondent contends there was not sufficient evidence of actual malice. Opposition at 11-12. However, respondent completely ignores undisputed evidence that the highest corporate officials and editors of OPUBCO deliberately sought to harm and "blister" Miskovsky at a time when they were actually aware that there was no basis for claiming that Miskovsky conspired with or manipulated Points. Petition at 8-9, 18-19 n. 15, 29a. If there is not on this record sufficient evidence of actual malice for this issue to be properly submitted to the jury, then OPUBCO and all other media defendants are granted absolute immunity from libel actions by public figures.

by Miskovsky's Petition: Who should decide the meaning of the cartoon? Should this factual determination be made by a properly instructed jury or a state appellate court which relied on an erroneous definition of actual malice? Petition at 19.

IV. RESPONDENT MISPERCEIVES MISKOVSKY'S FOURTH ARGUMENT.

Miskovsky squarely raised the issues contained in his fourth reason for review on the opening page of his Brief to the Oklahoma Supreme Court when he stated that "First Amendment rights belong to all the people, not just to media giants like OPUBCO." Appellee's Brief at 1. The press is entitled to no greater protection of its First Amendment rights than is Miskovsky. Allowing OPUBCO the absolute immunity which it claims is tantamount to abolishing the First Amendment rights of candidates for public office who may be out of favor with a local media monopoly.

Respondent characterizes Miskovsky's fourth issue as a request that this Court rule that First Amendment principles be abandoned in election campaigns. Opposition at 13. This characterization is blatantly incorrect. Miskovsky contends that the proper application of the *New York Times* rule with its requirement that a public figure libel plaintiff prove actual malice by clear and convincing evidence also requires a recognition of and balancing between the First Amendment rights of the publisher and those of the candidate. Under *New York Times*, the right of public figures to sue for defamation has not been abolished, but a heavier burden of proof is imposed on a public figure who seeks damages for injury to his reputation. Miskovsky argues that traditional First Amendment principles apply to him as a candidate for public office, not just to OPUBCO. The jury's verdict should be upheld because Miskovsky met the burden of proof required for a public figure to prove malice under *New York Times*.

CONCLUSION

For the foregoing reasons and for the reasons in the Petition, this Court should grant a writ of *certiorari*.

Respectfully submitted,

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